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MATERIALS ON STATE RESPONSIBILITY 2010-2015

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MATERIALS ON STATE RESPONSIBILITY

Dr. Nikolaos Voulgaris[1] & Orfeas Chasapis-Tassinis[2]

INTRODUCTION

Undeniably, the law of State responsibility for internationally wrongful acts occupies a central position within the international legal order. The International Law Commission (ILC) grappled with the issue for decades before adopting the draft articles on responsibility of States for internationally wrongful acts at its fifty-third session in 2001, evincing the significance as well as the difficulty of the task. Shortly after the adoption of the articles by the ILC, the General Assembly took note of the articles in resolution 56/83 of 12 December 2001, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

Given the fundamental place of the law of State responsibility within the international legal order, it is only natural that international courts and tribunals have been frequent users of the articles. A thorough study of international judicial and arbitral practice also evinces who are at the end of the day most likely to invoke and use the articles in their legal relations. Even further, a study of the law on State responsibility inevitably reveals a lot not only about the content of the law, but also about the way in which the law comes to life through the decisions of international courts and tribunals.

Thus, the articles themselves provide a perfect example that reflects the development of international law through the decisions of international courts and tribunals in at least two ways. First, the commentary to the articles benefited -where possible- from the existing international jurisprudence. In those areas where judicial decisions were abundant, the commentary founded the articulation of clear rules on previous judicial practice. Even in the case of already existing rules that were simply crystallized in the text of the articles (e.g. articles 4 and 31), the concentration of materials by the ILC provided a focal point for international judges and arbitrators

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who, in turn, based their decisions on the articles. This created a positive feedback loop where judicial decisions underpinned the articulation of rules, the clearer formulation of which encouraged in turn the reliance on these very rules by courts and tribunals.

While this process might have had only one natural outcome regarding those rules that were well established before the adoption of the articles, the situation was significantly different with other articles that either had conflicting, little or no practice to project them into safe normative ground. This 'twilight zone' of normativity, or, as the ILC calls it, the progressive development of the law, has been the second major way in which one can witness the impact of international jurisprudence on the development of international law and its influence on the ILC's work.

Article 25 on the state of necessity as a reason precluding wrongfulness perhaps provides the most indicative example of the latter case. The International Court of Justice (ICJ) ruled on the customary nature of the article in the *Gabcíkovo-Nagymaros Project* case basing its assessment on the ILC's commentary to the then-draft article 33 that enshrined the state of necessity as a circumstance precluding wrongfulness.[3] Then, the text of the ICJ decision that referred to the ILC's work made its way into the commentary of article 25 reinforcing its normative content as a rule of customary law. Of course, depending on their content, the practice regarding other articles has remained scant, or, with respect to some provisions, even virtually non-existent. Overall, however, the jurisprudence of international courts and tribunals can be said to have pulled, or is in the process of doing so, at least some of the articles out of the realm of progressive development.

Finally, aside from the effect of international practice to the normative caliber of each provision, there has undoubtedly been another kind of interaction that reveals the wider impact of the articles. This happens as the articles are being used to fill gaps in other similar fields of international law. Perhaps the most prominent example of this is the application (or the non-application) of the articles by analogy in relation to State responsibility for internationally wrongful acts against individuals, especially in the context of human rights and investment-treaty arbitration.

All in all, the study of international jurisprudence in relation to the articles on

[3] International Court of Justice*, Gabcikovo-Nagymaros Project (HungarylSlovakia), Judgment, 1.C.J. Reports 1997*, p. 7, paras 50-51.

State responsibility for internationally wrongful acts hints at deeper truths concerning the interaction between international courts and tribunals, and other authoritative bodies, such as the ILC, as each one plays its part in the development of international law.

What follows in this volume is a compilation, to the best of our efforts, of the practice of international courts and tribunals from the 31st of January 2010 and up to the completion of the present study, i.e. the 31st of January 2016. During this period, 64 relevant decisions of international courts, tribunals and other bodies were recorded.[4] Of course this is not the first time that an attempt is being made to document the instances where international courts and tribunals refer to the articles.

Rather, the present collection can be seen as the extension in time of previous works, especially the Secretary General's 2012 report undertaken upon request of the UN General Assembly that formed the initial inspiration for this project.[5] It does not aspire or intend to either replace or substitute the work carried out by UN Secretariat but rather to complement it. The same goes for the seminal study carried out by Simon Olleson in 2007 for the British Institute of International and Comparative Law, which does not overlap in temporal scope with the scope of this current effort.[6] The general formatting of the present collection of materials follows the Secretary General's report; each article is followed by the respective extracts of decisions and, in turn, each extract is accompanied by a brief description of the context in which the international court, tribunal or other body made the statement. As with the SG's report, submissions of parties invoking the articles, and opinions of judges appended to a decision are not included. However, for reasons of economy of space, the present collection does not reproduce the text of the commentaries to the articles.

The primary purpose of this research project was to document the instances where international courts, tribunals or other bodies refer explicitly to the articles. But, in line with the overall aim of the project which is to provide the necessary

[4] For the purposes of the present work the judgments and decisions of the following organs were scrutinized: the International Court of Justice; the International Tribunal for the Law of the Sea; international arbitral tribunals; panels established under GATT and WTO; the WTO Appellate Body; the European Court of Human Rights; and the Inter-American Court of Human Rights.

[5] *United Nations Legislative Series*, Materials on the Responsibility of States for Internationally Wrongful Acts, ST/LEG/SER.B/25, available at: http://legal.un.org/legislativeseries/documents/Book25/Book25.pdf.

[6] Olleson Simon, "The Impact of the ILC's Articles on Responsibility of States for Internationally Wrongful Acts", British Institute of International and Comparative Law Research Project, available at: http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf.

background for an assessment of the impact of the articles, some exceptions have been allowed where a decision does not reference the articles *eo nomine,* but its inclusion was considered important regarding the content of the articles. Finally, the topic has been included in the agenda of the 71st Session of the UN General Assembly and the prospect of the transformation of the articles into a multilateral convention will be discussed this fall.[7] Since the relevant debate on the normative calibre of the articles will inevitably turn to the most recent judicial decisions, it is timely to circulate the present collection for information in advance of the General Assembly discussion.

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This volume compiles the research assignments carried out by the students of the National and Kapodistrian University of Athens School of Law International Studies LL.M. Program ('17 class) as part of their assessment for the course 'The International Judicial Function' taught by Professor Photini Pazartzis and Lecturer Anastasios Gourgourinis. Dr. Nikolaos Voulgaris and Mr. Orfeas Chasapis-Tassinis, researchers at the Athens Public International Law Center, assisted the students with researching the materials included herein, as well as editing the students' work and compiling it in a single volume. The LL.M. students who contributed with their research to the present endeavor are: Alkistis Agrafioti-Chatzigianni, Georgios Alexandrakis, Nikoletta Chalikopoulou, Irini Fasia, Effrosyni Karamantzani, Alexandra Karaiskou, Georgios Klis, Christina Koudouna, Eleni Kyriakidou, Sofia Kyriazi, Dimitrios Liagkis, Victor Maidas, Maria-Koutsoupia Oraiozıli, Ioannis Papadis, Athanasios Pappas, Aggeliki Psaraki, Iris Stamatiadou, Christos Stamatis, Chrysovalantis Tsiliras, Narine Tumasyan, Christina Vellioti. The editors are particularly grateful to Christina Vellioti and Christos Stamatis for their assistance throughout this effort.

[7] UNGA A/RES/68/104 (16 December 2013) GAOR 68th Session, para. 5.

Abbreviations

AB	Appellate Body
DSU	Dispute Settlement Understanding
EC	European Community
ECtHR	European Court of Human Rights
GA	General Assembly
GATT	General Agreement on Tariffs and Trade
I/A Court	Inter-American Court
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
NAFTA	North American Free Trade Agreement
PCIJ	Permanent Court of International Justice
SDC	Seabed Disputes Chamber
UN	United Nations
WTO	World Trade Organization

Responsibility of States for Internationally Wrongful Acts

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article l
Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Swisslion Doo Skopje v. The Former Yugoslav Republic of Macedonia

In its 2012 award, the arbitral tribunal constituted to hear the *Swisslion Doo Skopje v. The Former Yugoslav Republic of Macedonia* case, assessed whether the decisions of the Respondent's courts interpreting and applying the contract between Swisslion and the Ministry of Economy could engage the international responsibility of the State. The arbitral tribunal found in this respect that:

> International courts and arbitral tribunals have often had to consider judgments rendered by national courts to determine what consequences they must draw from such judgments. In this respect, the Tribunal first notes that, under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary (footnotes omitted).[8]

The tribunals's final phrase included a direct reference in a footnote to article 1 and 6 finally adopted by the International Law Commission. Additionally, the tribunal underlined that "[t]hose rules are applicable in international investment law and have been applied by ICSID arbitral tribunals." [9]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

[8] ICSID, *Swisslion Doo Skopje v. The Former Yugoslav Republic of Macedonia,* Case No. ARB/09/16, award, 6 July, 2012, para. 261.
[9] *Ibid.,* para. 262.

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* case, examined the content of international responsibility under customary international law, as set forth by :

> The acts and omissions of Argentina in denying the Claimants fair and equitable treatment as required by the three BITs were therefore international wrongful acts since the acts and omissions in question, as actions done by State organs, were clearly attributable to the Argentine State and since, as the Tribunal's Decision on Liability found, they constituted a breach of Argentina's international obligations. As Article 1 of the Articles provides: "Every wrongful act of a State entails the international responsibility of that State." The comment to Article 1 makes clear that the term "international responsibility" "…covers the new legal relations which arise under international law by the internationally wrongful act of a State." Argentina, by reason of its international wrong in not respecting its obligations under the three BITs, is therefore subject to a new relationship toward the Claimants.[10]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 19: The M/V "Virginia G" Case (Panama/Guinea-Bissau)

In its 2014 judgment in the *The M/V "Virginia G" Case (Panama/Guinea-Bissau)* the International Tribunal for the Law of the Sea had to decide on the reparation owed to the State of Panama, in relation with the arrest and detention of the M/V Virginia G from the Republic of Guinea-Bissau. In reaching its conclusion, the Tribunal referred to article 1 finally adopted by the International Law Commission in 2001:

> The Tribunal notes that the Draft Articles of the International Law Commission on Responsibility of States for Internationally Wrongful Acts (hereinafter "the ILC Draft Articles on State Responsibility"), in article 1, reaffirm: "Every internationally wrongful act of a State entails the international responsibility of that State." [11]

After quoting its earlier advisory opinion on the question of the *"Responsibilities and obligations of States with respect to activities in the Area,* the Tribunal further

[10] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic,* Case No. ARB/03/19, award, 9 April 2015, para. 25.
[11] *ITLOS, N.19: The M/V "Virginia G" Case (Panama/Guinea-Bissau /14 April 2014),* para. 429.

concluded that article 1 finally adopted by the International Law Commission in 2001 reflects customary international law:

> The Tribunal observes that the Seabed Disputes Chamber of the Tribunal, in its Advisory Opinion, Stated that several of the ILC Draft Articles on State Responsibility are considered to reflect customary international law (see Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 56, para.169). Reference was made in the Advisory Opinion to article 31 of the ILC Draft Articles on State Responsibility (see paragraph 194, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 62, para. 194). The Tribunal adds that article 1 of the ILC Draft Articles on State Responsibility also reflects customary international law. [12]

Case No. 21, Request for an advisory opinion submitted by the sub-regional fisheries commission (SRFC)

In its 2015 advisory opinion, the International Tribunal for the Law of the Sea, had to rule upon the extent of the flag State's liability for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag. The Tribunal found that neither the UN Convention for the Law of the Sea nor the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Commission, provided guidance on that issue. The Tribunal then turned to relevant rules of international law, pursuant to article 293 of the UNCLOS, which allows the application of other rules of international law. The Tribunal referred to, *inter alia,* article 1 stating that it constitutes a rule of general international law.[13]

Article 2
Elements of an internationally wrongful act of a State

[12] *Ibid.,* para. 430.

[13] ITLOS, *Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC)*, Advisory Opinion, 2 April 2015, para. 144.

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* cases, referred to article 2 finally adopted by the International Law Commission in 2001:

> Article 2 of the Articles on Responsibility of States for Internationally Wrongful Acts, which is generally considered as a Statement of customary international law and on which both parties in this case have relied at various times, states: '[…]' The acts and omissions of Argentina in denying the Claimants fair and equitable treatment as required by the three BITs were therefore international wrongful acts since the acts and omissions in question, as actions done by State organs, were clearly attributable to the Argentine State and since, as the Tribunal's Decision on Liability found, they constituted a breach of Argentina's international obligations.[14]

Electrabel SA. v. Hungary

In its 2015 award, the arbitral tribunal constituted to hear the *Electrabel SA. v. Hungary* case referred to article 2 finally adopted by the International Law Commission in 2001 and cited the ninth paragraph of its Commentary to support the view that there is no general rule demanding the existence of damage in order to decide upon the existence of a State's international responsibility:

> The Tribunal acknowledges the Parties' agreement that quantum is not relevant to determine liability here and accepts that damages (or loss) are generally not necessary to a finding of liability, whilst remaining necessary to the granting of compensation, unless of course loss or

[14] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic***,** Case No. ARB/03/19, award, 9 April 2015, paras. 24 - 25.

damage are a constituent part of the legal wrong.[15]

EUROPEAN COURT OF HUMAN RIGHTS

Case of Mr. Sabah Jaloud v. Kingdom of the Netherlands

In its 2014 judgment, the European Court of Human Rights, sitting as a Grand Chamber, examined the role of the Netherlands' service personnel in the death of the applicant's son. The Court cited article 2 finally adopted by the International Law Commission in 2001 as a rule of international law, relevant for the establishment of the Netherlands' international responsibility.[16]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 21, Request for an advisory opinion submitted by the sub-regional fisheries commission (SRFC)

In its 2015 advisory opinion, the ITLOS had to rule upon the extent of the flag State's liability for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag. The Tribunal found that neither the UNCLOS nor the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Commission provides guidance on that issue. The Tribunal then turned to relevant rules of international law on responsibility of States, pursuant to article 293 of the UNCLOS, which allows the application of other rules of international law. The Tribunal referred to, *inter alia*, article 2 finally adopted by the International Law Commission in 2001stating that it constitutes a rule of general international law.[17]

Case no. 17, Responsibilities and Obligations of States Sponsoring Persons and

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15 ICSID, *Electrabel SA. v. Hungary* No.ARB/07/19, Award, 25 November, 2015, para.119.

16 European Court of Human Rights, Grand Chamber, *Sabah Jaloud v. Kingdom of the Netherlands*, (Application No. 47708/08), judgment, 20 November 2014, para. 98.

17 ITLOS, *Request for an Advisory Opinion submitted by the Sub-regional Fisheries Commission (SRFC),* Advisory Opinion, 2 April 2015, para. 144.

Entities With Respect to Activities in the "Area"

In its 2011 advisory opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea answered the request for an advisory opinion rendered by the Council of the International Seabed Authority the question of *"What are the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area"*. The Chamber sought to clarify the conditions under which the UNCLOS in Articles 139 paragraph 2 and 304 provides for the establishment of international responsibility. The Chamber noted a differentiation between ILC Article 2 and the UNCLOS since the Convention has inserted damage as a necessary condition for the establishment of international responsibility. More specifically, the SDC held that:

> […] according to the first sentence of article 139, paragraph 2, of the Convention, the failure of a sponsoring State to carry out its responsibilities entails liability only if there is damage". In consequence, acknowledged that: "This constitutes an exception to the customary international law rule on liability since, as Stated in the Rainbow Warrior Arbitration and in paragraph 9 of the Commentary to article 2 of the ILC Articles on State Responsibility, a State may be held liable under customary international law even if no material damage results from its failure to meet its international obligations.[18]

INTER-AMERICAN COURT OF HUMAN RIGHTS

Gutiérrez and Family v. Argentina, Merits, Reparations and Costs, Judgment of November 25, 2013, I/A Court H. R., Series C No. 271 (2013)

In its 2013 judgment, in the case of *Gutiérrez and Family v. Argentina*, the Inter-American Court considered the independence of the existence of an internationally wrongful act with the characterisation of the same act as wrongful in the domestic jurisdiction of the State involved. In support of its finding, the court cited in a footnote article 2 finally adopted by the International Law Commission in 2001, concluding that:

> In this regard, the Court recalls that, in order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as under domestic criminal law, the guilt of the authors or their intentions, nor is it necessary to identify, individually, the agents to which the violations are attributed. It is sufficient that the State has

[18] ITLOS, Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area" (CASE No 17),* Advisory Opinion, 1 February 2011, para. 178.

an obligation that it has failed to comply with; in other words, that this unlawful act is attributed to it. (footnotes omitted)[19]

[19] Inter-American Court of Human Rights, *Gutiérrez and Family v. Argentina, Merits, Reparations and Costs, Judgment of November 25, 2013, I/A Court H. R., Series C No. 271 (2013),* at para. 78 (see fn. 163)

Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

EDF International S.A., Saur International S.A. And Leon Participationes Argentinas S.A. v. Argentine Republic

In its 2012 award, the arbitral tribunal constituted to hear the *EDF International S.A., Saur International S.A. And Leon Participationes Argentinas S.A. v. Argentine Republic* cases having considered in length the parties' arguments concerning the legality of the Emergency Measures of legislation that Argentina put forward in 2001 because of its severe economic, political and social crisis which violated its international obligations under the applicable BIT, concluded the following:

> In addition, Article 3 of the 2001 International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that the characterization of an act of a State as internationally wrongful —is not affected by the characterization of the same act as lawful by internal law. Thus the legality of Respondent's acts under national law does not determine their lawfulness under international legal principles. The fact that the Argentine Supreme Court has vested Respondent with robust authority during national economic crises does not change the Tribunal's analysis.[20]

EUROPEAN COURT OF HUMAN RIGHTS

Case of Mr Sergey Borisovich Anchugov and Mr Vladimir Mikhaylovich Gladkov v. Russia

In its 2013 judgment in the *Anchugov and Gladkov v. Russia* case, the European Court of Human Rights, examined an alleged violation of the applicants' right to vote

[20] ICSID, *EDF International S.A., Saur International S.A. And Leon Participationes Argentinas S.A. V. Argentine Republic,* Case No. ARB/03/23, award, 11 June 2012, paras. 906-907.

and the Government's view that such a restriction of the electoral rights of convicted prisoners in detention was enacted in the Russian Constitution. Specifically, the Court, quoted as a relevant rule of international law the text of article 3 finally adopted by the International Law Commission in 2001 along with the commentary, that pertains to the responsibility of a State for all acts and omissions of its organs regardless of whether the act or omission in question is dictated by domestic law.[21]

INTERNATIONAL COURT OF JUSTICE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia- 3 February 2015 Judgment)

In its 2015 judgment, in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* the International Court of Justice referred to the article 3 finally adopted by the International Law Commission in 2001 and held that:

…the Court applies the rules of general international law on the responsibility of States for internationally wrongful acts. Specifically, Article 3 of the ILC Articles on State Responsibility, which reflects a rule of customary law, States that *'[t]he characterization of an act of a State as internationally wrongful is governed by international law*.[22]

[21] European Court of Human Rights, First Section, *Anchugov and Gladkov v. Russia,* (Application Nos. 111/57 and 15162/05) ,judgment, 9 December 2013, para. 37.

[22] International Court of Justice, *Application of the convention on the prevention and punishment of the crime of genocide (Croatia v. Serbia), Judgment, 2015*, para. 128.

CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Alpha Projekt Holding GMBH v. Ukraine

In its 2010 award, the arbitral tribunal constituted to hear the *Alpha Projekt holding Gmbh v Ukraine* case, dealt with questions of attribution of the conduct of an State organ. The arbitral tribunal, after referring to the parties' arguments under articles, 4, 5 and 8 of the ILC Articles, concluded that applicable in the present case was article 4 finally adopted by the International Law Commission on 2001:

> …the SAA (alone or with other State actors) instructed the cessation of payments. SAA being a State organ as described above, such action is clearly attributable to the State under Article 4(1) of the ILC Articles. The Tribunal makes two additional observations on this point, as they are relevant to the disposition of Claimant's claims. First, whether the stop in payments was based on commercial or other reasons is irrelevant with respect to the question of attribution. […] Second, […] (i)t was the Hotel, not the State, that entered into the contracts, and the Hotel, not the State, that breached the contracts. However, it was Ukraine's conduct that interfered with the contracts and caused the Hotel to breach the contracts outside proper channels, and it is that conduct that is unquestionably State conduct and that implicates Ukraine's international responsibility.[23]

Vannessa Ventures LTD v. The Bolivarian Republic of Venezuela

[23] ICSID, *Alpha Projekt Holding GMBH v. Ukraine,* Case No. ARB/07/16, award, 8 November 2010, *paras.* 400- 403.

The arbitral tribunal directly referred to the 6th paragraph of the Commentary to article 4 in a footnote in the following part of its decision:

> It is well established that, in order to amount to an expropriation under international law, it is necessary that the conduct of the State should go beyond that which an ordinary contracting party could adopt.[24]

Franck Charles Arif v. Republic of Moldova

In its 2013 award, the arbitral tribunal constituted to hear the *Franck Charles Arif v. Republic of Moldova* questioned whether local remedies must be exhausted before the Tribunal examines if a court's decision gives rise to the international responsibility of a State. In coming to a conclusion, the Tribunal referred to Article 4 of the ILC Articles and stated that courts' decisions are attributable to a State irrespective of prior exhaustion of remedies and thus, they may engage its international responsibility, provided, naturally, that they are in contravention of a primary international obligation:

> According to Article 4 of the ILC Articles on State Responsibility: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function… [25]
>
> …In light of the above, the Tribunal finds that, as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made). Respondent's argument that there can be no international wrongful act or Treaty dispute arising from a court decision until the entire justice system has heard the case is therefore rejected. The Tribunal notes that to develop this argument Respondent has only relied on cases where a denial of justice claim was under consideration.[26]

Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador

In its 2012 award, the arbitral tribunal constituted to concluded that the adoption by the Ecuadorian Congress of the VAT Interpretative Law had a negative impact on the fair market value of the Claimants' investment and thus unfairly and arbitrarily, frustrated

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[24] ICSID, *Vannessa Ventures LTD v. The Bolivarian Republic of Venezuela*, Case No. ARB(AF)/04/06, Under Nafta, award, 16 January 2013, *para.* 209 see fn 209.
[25] ICSID, *Franck Charles Arif v. Republic of Moldova*, Case No. ARB/11/23, award, merits, 8 April 2013, para. 344.
[26] *Ibid.,* para. 347.

the legitimate expectations of the Claimants. The enactment of legislation by a State's legislative body constitutes an act attributable to the State. In reaching this conclusion, the Tribunal referred to article 4 finally adopted by the International Law Commission in 2001:

> While the VAT Interpretative Law was presented as an attempt to clarify the confusion identified by the VAT Tribunal, the fact of the matter is that the VAT Interpretative Law accomplishes the very same effect as the SRI Decrees which the VAT Tribunal had found to be in breach of certain provisions of the Treaty. Under international law, a State can be found to have discriminated either by law, regulation or decree. Article 4.1 of the Articles on Responsibility of States for Internationally Wrongful Acts, as adopted by the International Law Commission, is controlling. […] In the view of the Tribunal, the VAT Interpretative Law, unfairly and arbitrarily, frustrated the legitimate expectations of the Claimants in precisely the same way as the SRI's Decrees and is thus also in breach of the Treaty. As such, as between the Claimants and the Respondent, the VAT Interpretative Law is without legal effect and should not be taken into account as a factor which impacts the fair market value of the Claimants' investment.[27]

SGS Societe Generale De Surveillance S.A. v. The Republic of Paraguay

In its 2010 award, the arbitral tribunal constituted to hear the *SGS Societe Generale De Surveillance S.A. v. The Republic of Paraguay* case examined whether a certain conduct was to be attributed to the State in its capacity as a State or whether the State had acted in its private capacity. Although the tribunal did not refer explicitly to the articles finally adopted by the International Law Commission in 2001, it held that:

> The Tribunal notes here the challenge of drawing a line between an ordinary commercial breach of contract and acts of sovereign interference or jure imperii, particularly in the context of a contract entered into directly with a State organ (here, the Ministry of Finance). Logically, one can characterize every act by a sovereign State as a "sovereign act"—including the State's acts to breach or terminate contracts to which the State is a party. It is thus difficult to articulate a basis on which the State's actions, solely because they occur in the context of a contract or a commercial transaction, are somehow no longer acts of the State, for which the State may be held internationally responsible.[28]

WORLD TRADE ORGANIZATION PANEL

United States – Certain country of Origin Labelling (cool) requirements

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[27] ICSID, *Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador,* Case No. ARB/06/11, award, merits, 5 October 2012, paras. 558-560.
[28] ICSID, *SGS Societe Generale De Surveillance S.A. v. The Republic of Paraguay,* Case No. ARB/07/29, decision on jurisdiction, 12 February 2010, para. 135.

In its 2011 report in the *United States – Certain country of Origin Labelling (cool) requirements* case, the panel quoted certain passages from to the Appelate Body's Report in *US – Export Restraints*, where the Appellate Body had stated that:

> in principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the State, including those of the executive branch.[29]

In a footnote, the panel further noted that:

> We observe that this is also consistent with the principle in the relevant provisions of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, as pointed out by the European Union, a third party participant in this dispute.[30]

EUROPEAN COURT OF HUMAN RIGHTS

Case of Jones and Others v. United Kingdom

In its 2014 judgment in the case of *Jones and Others v. United Kingdom* the ECtHR specifically referred to Article 4 which had already been quoted in full as a relevant international legal rule:

> The Draft Articles on State Responsibility, for their part, provide for attribution of acts to a State, on the basis that they were carried out either by organs of the State as defined in Article 4 of the Draft Articles […]. The applicants do not seek to deny that the acts of torture allegedly inflicted on them engaged the responsibility of the State of Saudi Arabia. But it should be noted that the Draft Articles only concern the question whether a State is liable for the impugned acts, because once a State's liability has been established, the obligation to provide redress for the damage caused may arise under international law.[31]

Case of Mr Lukáš Bureš v. The Czech Republic

In its 2013 judgment in the *Bureš v. the Czech Republic* case, the ECtHR quoted the texts of Articles 4 and 5 and recognised that the Articles, are largely considered to contain rules of customary international law. The Court applied Article

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[29] WTO, *United States – Certain country of Origin Labelling (cool) requirements*, WT/DS384/R - WT/DS386/R, 18 November 2011, para. 716.

[30] *Ibid*., , fn. 41, para.25.

[31] European Court of Human Rights, Fourth Section, *Jones and others v. the United Kingdom*, (Applications Nos. 34356/06 and 40528/06), judgment, 14 January 2014, para. 207.

5 in determining whether the actions of the medical staff on a State-run sobering-up centre could be attributed to the State.[32] Referring to paragraph 54 (where Articles 4 and 5 are quoted), concluded that even if the medical staff in the sobering up-centre are not considered to be State agents (according to Article 4), they nevertheless perform governmental authority (according to Article 5) and thus should be treated as organs of the State:

> Even accepting the Government's contention that the medical staff in the sobering up-centre are not State agents, they nevertheless perform governmental authority of detention (compare § 54 above). The State is responsible for the well-being of detainees (Kudła v. Poland [GC], no. 30210/96, § 94, ECHR 2000-XI, and Moisejevs v. Latvia, no. 64846/01, § 78, 15 June 2006) and cannot evade its responsibility by delegating its power to other entities.[33]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA THE UNCITRAL RULES)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc. v. the Government of Canada

In its 2015 award, the arbitral tribunal constituted to hear *Bilcon of Delaware, Inc. et al. and the Government of Canada* cases dealt with the rejection of an investment project in Nova Scotia on environmental grounds by the Canadian Federal Government in line with the recommendations of a Joint Review Panel (JRP). The Respondent submitted *inter alia* that the JRP is not an organ of Canada according Article 4(2) of the ILC Articles and that, therefore, its actions cannot be attributed to the Respondent. The Tribunal referred to article 4 concerning the conduct of organs of a State as a rule of customary law.[34] The Tribunal avoided to answer whether JRP was indeed an organ of Canada and reached the conclusion that in any event, Article 11 suffices to establish Canada's international responsibility:

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[32] European Court of Human Rights, Fith Section, *Lukáš Bureš v. The Czech Republic,* (Application No. 37679/08), judgment, 18 October 2012, para. 76.
[33] *Ibid*., para. 77.
[34] International Arbitral Tribunal, *In the Matter of Arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Rules of 1976 between William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc. and Government of Canada*, Award on Jurisdiction and Liability (Case No. 2009-04), 17 March 2015, para. 307.

The Tribunal recalls the Investors' contention that the JRP is an "integral part of the government apparatus of Canada". Even if it were not, the Investors submit, it is empowered to exercise elements of Canada's governmental authority. The Tribunal agrees. The JRP is not a body with an existence that precedes the assessment of a particular project or survives after its tasks are completed. Its members are appointed by the Minister of the Environment for Canada. Panel members may be appointed from a roster established by the Minister. The members must be "unbiased and free from any conflict of interest relative to the project". A body that exercises impartial judgment, however, can well be an organ of the State; Article 4 of the ILC Articles, just quoted, specifically includes those exercising "judicial" functions. The functions that the JRP must discharge are of a governmental nature.[35]

In any event, the decisive issue is whether the JRP is part of the Government of Canada according to international law. As the commentary to the ILC Articles observes in relation to Article 4, "a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law.[36]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ECT AND THE UNCITRAL RULES)

Case No. AA 226: In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules (Hulley Enterprises Limited v. Russian Federation-18 July 2014

In its 2014 award, the arbitral tribunal constituted to hear the *Hulley Enterprises Limited v. Russian Federation* case, in judging whether the actions of the Respondent's Tax Ministry constituted acts of a state organ, referred to article 4:

The foregoing line of argument runs up however against the ILC Articles on State Responsibility. Article 4 provides that "[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State . . . ." The commentary to this article specifies that "[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as 'commercial' or as 'acta iure gestionis'.[37]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Renee Rose Levy de Levi v. The Republic of Peru

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[35] *Ibid,* para. 308.

[36] *Ibid,* para. 315.

[37] International Arbitral Tribunal, *No. AA 226: In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules Hulley Enterprises Limited (Cyprus) v. The Russian Federation,* 18 July 2014 para. 1479.

In its 2014 award, arbitral tribunal constituted to hear the *Renee Rose Levy de Levi v. The Republic of Peru* referred to article 4(1) finally adopted by the International Law Commission in 2001. Specifically, the Respondent raised admissibility objections submitting that the organ acted under the Peruvian law and, therefore, the tribunal was not competent to adjudicate on the dispute, because it would have to examine actions taken by the authorities of Peru:

> The Tribunal considers it important to reproduce Article 4(1) of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts, which reads: "The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial, or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.(footnote ommitted)"
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> […]The Tribunal concludes that its mission is precisely that of determining whether the actions of Peru violated the APPRI. Logically, this is mission reserved for the merits phase of this case; for the above reasons, the Tribunal will also reject this argument on the admissibility advanced by the Respondent.[38]

[38] ICSID, *Renee Rose Levy de Levi v. The Republic of Peru,* Case No. ARB/10/17, award, 26 February 2014, paras. 157-162.

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

EUROPEAN COURT OF HUMAN RIGHTS

Case of Kotov v. Russian Federation

In its 2012 judgment in the case of *Kotov v. Russian Federation* the applicant alleged that he had been deprived of his possessions (Article 1 of Protocol No. 1 of the ECHR) by an unlawful act of a liquidator appointed by a judge to distribute the assets of an insolvent bank. The Court found that the liquidator was not empowered by the State to exercise elements of governmental authority according to article 5 finally adopted by the International Law Commission in 2001:

> The Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission (ILC) in 2001 (*Yearbook of the International Law Commission*, 2001, vol. II, Part Two), and their commentary, codified principles developed in modern international law in respect of the State's responsibility for internationally wrongful acts. […] The ILC, in its commentary, described the phenomenon of "parastatal entities". […].[39]
>
> Most importantly, the liquidator had very limited powers: he was indeed empowered to manage the property of the company in question, but had no coercive or regulatory power in respect of third parties. There was no formal delegation of powers by any governmental authority (and, as a result, no public funding). […] It would appear that the liquidator, at the relevant time, enjoyed a considerable amount of operational and institutional independence, as State authorities did not have the power to give instructions to him and therefore could not directly interfere with the liquidation process as such. The State's involvement in the liquidation procedure resulted only from its role in establishing the legislative framework for such procedures, in defining the functions and the powers of the creditors' body and of the liquidator, and in overseeing observance of the rules. It follows that the liquidator did not act

[39] European Court of Human Rights, Grand Chamber, *Kotov v. Russia*, (Application No. 54522/00), judgment, 3 April 2012, paras. 30-31.

as a State agent. Consequently, the respondent State cannot be held directly responsible for his wrongful acts in the present case.[40]

Case of Jones and Others v. United Kingdom

In its 2014 judgment in the case of *Jones and Others v. United Kingdom* regarding the acts of Saudi Arabia's Lieutenant Colonel Abdul Aziz, the ECtHR specifically referred to article 5 which had already been quoted in full as a relevant international legal rule:

> …or by persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles (see paragraph 108 above). The applicants do not seek to deny that the acts of torture allegedly inflicted on them engaged the responsibility of the State of Saudi Arabia. But it should be noted that the Draft Articles only concern the question whether a State is liable for the impugned acts, because once a State's liability has been established, the obligation to provide redress for the damage caused may arise under international law.[41]

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In its 2013 judgment in the *Bureš v. the Czech Republic* case, the ECtHR quoted the texts of Articles 4 and 5 and recognised that the Articles, are largely considered to contain rules of customary international law. The Court applied Article 5 in determining whether the actions of the medical staff on a State-run sobering-up centre could be attributed to the State.[42] Referring to paragraph 54 (where articles 4 and 5 are quoted), concluded that even if the medical staff in the sobering up-centre are not considered to be State agents (according to article 4), they nevertheless perform governmental authority (according to article 5) and thus should be treated as organs of the State:

> Even accepting the Government's contention that the medical staff in the sobering up-centre are not State agents, they nevertheless perform governmental authority of detention (compare

[40] *Ibid.,* paras 105-106.

[41] European Court of Human Rights, Fourth Section, *Jones and others v. the United Kingdom*, (Applications Nos. 34356/06 and 40528/06), judgment, 14 January 2014, para. 207.

[42] European Court of Human Rights, Fith Section, *Lukáš Bureš v. The Czech Republic,* (Application No. 37679/08), judgment, 18 October 2012, para. 76.

§ 54 above). The State is responsible for the well-being of detainees (Kudła v. Poland [GC], no. 30210/96, § 94, ECHR 2000-XI, and Moisejevs v. Latvia, no. 64846/01, § 78, 15 June 2006) and cannot evade its responsibility by delegating its power to other entities.[43]

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[...] the Tribunal has regard to relevant provisions of the ILC Articles, which provide as follows:[…] *Article 5:[...]*. The ILC Articles quoted here are considered as Statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties.[…] The Tribunal recalls the Investors' contention that the JRP is an "integral part of the government apparatus of Canada". Even if it were not, the Investors submit, it is empowered to exercise elements of Canada's governmental authority. The Tribunal agrees. The JRP is not a body with an existence that precedes the assessment of a particular project or survives after its tasks are completed. Its members are appointed by the Minister of the Environment for Canada. Panel members may be appointed from a roster established by the Minister. The members must be "unbiased and free from any conflict of interest relative to the project.[44]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

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[43] *Ibid*., para. 77.

[44] International Arbitral Tribunal (PCA), In the Matter of Arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Rules of 1976 between William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc. and Government of Canada, Award on Jurisdiction and Liability (Case No. 2009-04), 17 March 2015, International Arbitral Tribunal, *In the Matter of Arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Rules of 1976 between William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc. and Government of Canada*, Award on Jurisdiction and Liability (Case No. 2009-04), 17 March 2015, paras. 306-308.

Bosh International, INC and B&P LTD Foreign Investments Enterprise v. Ukraine

In its 2012 award, the arbitral tribunal constituted to hear th *Bosh International, INC and B&P LTD Foreign Investments Enterprise v. Ukraine* case had to determine whether the conduct by a university is attributable to a State. As the tribunal stated:

> […] the Tribunal considers that the University remains an entity that is empowered by the law of Ukraine to exercise elements of governmental authority. In this regard, it is of no moment that the University has a large degree of autonomy, as the ILC commentary to Article 5 States, that provision also covers 'autonomous institutions as exercise public functions of a legislative or administrative character. […]For these reasons, the Tribunal determines that the first limb of Article 5 of the ILC Articles on State Responsibility is satisfied. […]the Tribunal observes that the ILC commentary explains in this regard as follows: […] In accordance with the ILC's commentary to Article 5, the Tribunal considers that it is only the 'governmental activity' of the University which is attributable to Ukraine under Article 5, and not the University's 'private or commercial activity.' In other words, the question that falls for determination is whether the University's conduct in entering into and terminating the 2003 Contract with B&P can be understood or characterized as a form of 'governmental activity', or as a form of 'commercial activity. […] the Tribunal finds that the University's conduct in entering into and terminating the 2003 Contract is not attributable to Ukraine under Article 5 of the ILC Articles on State Responsibility.[45]

[45] ICSID, *Bosh International, INC and B&P LTD Foreign Investments Enterprise v. Ukraine,* Case No. ARB/08/11, award, 25 October 2012, paras 173-178.

Article 6
Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Swisslion Doo Skopje v. The Former Yugoslav Republic of Macedonia

In its 2012 award, the arbitral tribunal constituted to hear the *Swisslion Doo Skopje v. The Former Yugoslav Republic of Macedonia* case, assessed whether the decisions of the Respondent's courts interpreting and applying the contract between Swisslion and the Ministry of Economy could engage the international responsibility of the State. According to the tribunal, the reason why these decisions could engage the Respondent's international responsibility is because they are considered to be conduct of a State organ:

> International courts and arbitral tribunals have often had to consider judgments rendered by national courts to determine what consequences they must draw from such judgments. In this respect, the Tribunal first notes that, under customary international law, every wrongful act of a State entails the international responsibility of that State. This covers the conduct of any State organ, including the judiciary (footnotes omitted).[46]

The tribunal's final phrase included a direct reference in a footnote to ILC articles 1 and 6. Additionally, the Court underlined that "Those rules are applicable in international investment law and have been applied by ICSID arbitral tribunals. [47]

EUROPEAN COURT OF HUMAN RIGHTS

Sabah Jaloud v. Kingdom of the Netherlands

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[46] ICSID, *Swisslion Doo Skopje v. The Former Yugoslav Republic of Macedonia,* Case No. ARB/09/16, award, 6 July, 2012, para. 261.
[47] *Ibid.,* para. 262.

In its 2014 judgment in the case of *Sabah Jaloud v. Kingdom of the Netherlands*, the ECtHR, sitting as a Grand Chamber, examined the role of the Netherlands' service personnel in the death of the applicant's son. The Court cited article 6 finally adopted by the International Law Commission as a rule of international law, relevant for the establishment of the Netherlands' international responsibility. The ECrtHR applied article 6 in order to determine whether the conduct in question can be attributable to the Netherlands, given that Netherlands troops participated in the Stabilization Force in Iraq (SFIR) under the command of an officer of the armed forces of the United Kingdom:

> That being so, the Court cannot find that the Netherlands troops were placed "at the disposal" of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were "under the exclusive direction or control" of any other State (compare, mutatis mutandis, Article 6 of the International Law Commission's Articles on State Responsibility, see paragraph 98 above; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, § 406, paragraph 97 above)).[48]

[48] European Court of Human Rights, Grand Chamber, *Sabah Jaloud v. Kingdom of the Netherlands*, (Application No. 47708/08), judgement, 20 November 2014 para. 151.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

EUROPEAN COURT OF HUMAN RIGHTS

El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in the *El-Masri v. The Former Yugoslav Republic of Macedonia* case*,* the European Court of Human Rights, sitting as Grand Chamber, cited article 7 finally adopted by the International Law Commission as a relevant rule of international law. The case originated in an application lodged by a German national who was subject to a secret rendition operation; he was arrested, held incommunicado, questioned and ill-treated by FYROM agents in Skopje and subsequently delivered at Skopje airport to CIA agents who tortured him and then transferred him to a secret detention facility in Afghanistan.[49]

Al Nashiri v. Poland

In its 2014 judgment in the *Al Nashiri v. Poland* case, the European Court established that Poland hosted a secret CIA detention camp, and found that Poland breached the European Convention on multiple counts: by allowing and enabling Al Nashiri's secret detention and torture in Poland, by enabling his transfer from Poland to the United States despite the real risk that his rights would be further violated and by failing to conduct an effective investigation leading to the violation of his rights. .

[49] European Court of Human Rights, Grand Chamber, *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application No. 39630/09), judgment, 13 December 2012, para. 97.

The Court, *inter alia*, cited Article 7 finally adopted by the International Law Commission as a relevant rule of international law.[50]

Case of Husayn (Abu Zubaydah) v. Poland

In its judgment in the case of *Husayn (Abu Zubaydah) v. Poland*, the European Court of Human Rights cited, *inter alia*, article 7 finally adopted by the International Law Commission as a relevant rule of international law.[51]

[50] European Court of Human Rights, Fourth Section, *Al Nashiri v. Poland,* (Application No. 28761/11), judgment, 24 July 2014, para. 207.
[51] European Court of Human Rights, Former Fourth Section, *Case of Husayn (Abu Zubaydah) v. Poland,* (Application No. 7511/13), judgment, 24 July 2014, para. 201.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Electrabel S.A. v. The Republic Of Hungary

In its 2012 decision on jurisdiction, applicable law and liability, the arbitral tribunal constituted to hear the *Electrabel S.A. v. The Republic Of Hungary* case, in determining the issue of attribution of a private entity's conduct to the Respondent referred to well-established attribution rules under customary international law as codified in the articles finally adopted by the International Law Commission:

> The Tribunal decides the issue of attribution under international law as required by the ECT; and it refers as a codification of customary international law to the Articles on State Responsibility adopted on second reading in 2001 by the International Law Commission and commended to the attention of Governments by the UN General Assembly in Resolution 56/83 of 12 December 2001 (the "ILC Articles").[52]

The criteria for attribution of a private entity's conduct to the State in cases where the former's conduct is directed or controlled by the State, were highly disputed by the parties and in summary constituted the subject-matter of this particular case:

> It is common ground between the Parties that the acts of the Hungarian Government, including HEO (Hungarian Energy Office), are attributable to Hungary under Article 4 of the ILC Articles. The Parties disagree, however, as to whether the conduct of MVM (private entity) can be attributed to Hungary. As for MVM's conduct in 2005-2006 and 2008, Electrabel contends that it is attributable to Hungary; and for its part, Hungary denies this allegation and has

[52] ICSID, *Electrabel S.A. V. The Republic Of Hungary,* Case No. ARB/07/19, decision on jurisdiction, applicable law andlLiability, 30 November 2012, para. 7.60.

submitted, as already noted, an objection to the Tribunal's jurisdiction concerning the commercial acts of MVM"[53]

Having referred in detail to the Commentary to the ILC Articles with regard to the interpretation and implementation of article 8, the arbitral tribunal distinguished between two alternative situations:

Article 8 ILC sets out two alternative situations that give rise to such "special factual relationship": (i) first, where a non-State entity acts "under the instructions of" the State, and (ii) second, where it acts "under the direction or control of" the State.[54]

With regard to the question of direction or control by the State, the tribunal subsequently concluded that:

It is common ground that MVM is a private entity, controlled by the State but having a separate legal personality. The Tribunal has already decided, above, that the degree of control required for finding attribution under international law is generally demanding. More specifically, the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State. This has been expressed in the clearest possible terms in the ILC Commentary under Article 8 […]The acts of MVM, being a private entity, are therefore not ipso facto attributable to the State because it is owned by the State.[55]

As for the issue of the private entity's conduct allegedly under the instructions of the State, the tribunal found that:

…Even if it were acknowledged (for the sake of argument) that the HEO letter was also meant to influence the negotiation of the parties […]it cannot be considered as an "instruction" by HEO (Hungarian Energy Office) to MVM […]In the Tribunal's view, this wording is not indicative of an act to be performed under the instruction of the Hungarian State by MVM, such as to attribute to the State the acts of MVM in the failed negotiations […]It is, by its terms, an invitation to both parties to "negotiate" effectively […]In other words, an invitation to negotiate cannot be assimilated to an instruction. The Tribunal therefore concludes that the HEO November 2005 Letter does not contain any instructions, in the sense of Article 8 of the ILC Articles, so that MVM's conduct supposedly following such instructions should be attributed to Hungary.[56]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

[53] *Ibid.,* para. 7.62.
[54] *Ibid.,* para. 7.64.
[55] *Ibid.,* para. 7.95.
[56] *Ibid*., paras. 7.109-7.111.

Adel A Hamadi Al Tamimi v. Sultanate of Oman

In its 2015 award, the arbitral tribunal constituted to hear the *Adel A Hamadi Al Tamimi v. Sultanate of Oman* case dealt with the issue as to whether the requirements, under which an act of a private entity may be attributed to a State under the articles 4-11, can be limited by specific provisions set forth under a specialized regime. In *casu,* the attribution test provided for under the US-Oman Free Trade Agreement is narrower than that determined by the ILC Articles, since the act of a State enterprise may be attributed to a State only if some additional requirements, other than those established under customary international law, are fulfilled. In reaching a conclusion, the Tribunal referred to Article 8 finally adopted by the International Law Commission:

> This test under Article 10.1.2 may be narrower in some respects than the test for State responsibility under customary international law – as described, for example, in the ILC Articles on State Responsibility ("ILC Articles"), which set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the conduct of a person or entity is closely directed or controlled by the State, although the parameters of imputability on this basis remain the subject of debate.[…]
>
> The effect of Article 10.1.2 of the US–Oman FTA is to limit Oman's responsibility for the acts of a State enterprise such as OMCO to the extent that: (a) the State enterprise must act in the exercise of "regulatory, administrative or governmental authority"; and (b) that authority must have been delegated to it by the State. This is significantly narrower than the several grounds of attribution provided under the ILC Draft Articles on State Responsibility, which also include situations where, for instance, the relevant entity merely acts under the control or direction of the State: see RLA-065 at 101.[57]

EUROPEAN COURT OF HUMAN RIGHTS

Catan and Others v. Moldavia and Russia

In its 2012 judgment in the case of *Catan and Others v. Moldavia and Russia* the European Court, sitting as Grand Chamber, had to determine first, whether Russia exercised jurisdiction (within the meaning of Article 1 of the ECHR) over part of the Moldovan community of Transdniestria and, second, whether Russia was responsible for the effects on the children's education and family lives of the applicants (under

[57] ICSID, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* Case No. ARB /11/33, award, merits, 3 November 2013*, paras* 320, 322.(footnotes omitted).

Article 2 of Protocol No. 1 right to education) brought about by the language policy of the separatist authorities ("MRT"). In this context, the ECtHR cited Articles 6 and 8 articles finally adopted by the International Law Commission as relevant rules of international law, for the determination of Russia's international responsibility.[58] According to the Court, Russia exercised effective control over an area outside its national territory. In reaching its conclusion the Court examined the strength of Respondent's military presence in the area and the extent to which its military, economic and political support for the subordinate administration provided with influence and control over the region:[59]

Sabah Jaloud v. Kingdom of the Netherlands

In its 2014 judgment, the European Court of Human Rights, sitting as a Grand Chamber, examined the role of the Netherlands' service personnel in Iraq in the death of the applicant's son. The Court cited article 8 finally adopted by the International Law Commission as a rule of international law, relevant for the establishment of the Netherlands' international responsibility.[60]

Liseytseva and Maslov v. Russian Federation

In its 2014 judgment, the European Court of Human Rights cited articles 5 and 8 finally adopted by the International Law Commission as relevant rules of international law and applied the latter in order to assess whether the conduct of municipal authorities is attributed to the State.[61] According to the Court:

> […] in order to decide on the operational and institutional independence of a given municipal unitary enterprise having the right of economic control, and in line with its earlier case-law (cited in paragraphs 186-92 above) the Court has to examine the actual manner in which State control was exercised in a particular case. In the Court's view, this approach is consistent

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[58] European Court of Human Rights, Grand Chamber, *Catan and Others v. Moldavia and Russia,* (Application Nos. 43370/04, 8252/05, 18454/06), judgment, 19 October 2012, para. 74.

[59] Ibid., para. 107

[60] European Court of Human Rights, Grand Chamber, *Sabah Jaloud v. Kingdom of the Netherlands*, (Application No. 47708/08), judgment, 20 November 2014, at para. 98.

[61] European Court of Human Rights, First Section, *Liseytseva and Maslov v. Russia* (Applications Nos. 39483/05 and 40527/10), judgment, 9 October 2014, paras 128-130.

with the ILC's interpretation of the aforementioned Article 8 of the Articles on State Responsibility (see paragraph 130 above).[62]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 21 Request for an advisory opinion submitted by the sub-regional fisheries commission (SRFC)

In its 2015 advisory opinion, the International Tribunal for the Law of the Sea, had to examine the scope of the flag State's obligation "to ensure" compliance by vessels flying its flag with the laws and regulations concerning conservation measures adopted by the coastal State. In this context, the Tribunal made reference to the rule incorporated in paragraph 1 of the Commentaries to Article 8 quoting a prior advisory opinion rednered by the Seabed Disputes Chamber.[63]

Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area"

In its 2011 advisory opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea answered the request for an advisory opinion rendered by the Council of the International Seabed Authority the question of *"What are the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area"*. In its advisory opinion, the SDC, quoted the Commentary to article 8 finally adopted by the International Law Commission to clarify the scope of a sponsoring State's obligation "to ensure" compliance by a sponsored contractor:

> The expression "to ensure" is often used in international legal instrument to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law.[64]

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[62] *Ibid.,* para. 205.

[63] ITLOS, *Request for an Advisory Opinion submitted by the Sub- regional Fisheries Commission* (SRFC), Advisory Opinion, 2 April 2015, para. 128.

[64] ITLOS, Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area" (CASE No 17),* Advisory Opinion, 1 February

2011, para. 112.

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL COURT OF JUSTICE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v. Serbia, Judgment, (3 February 2015)

In its 2015 judgment, in the case of a potential violation of Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice referred to article 10(2) finally adopted by the International Law Commission. In addressing Croatia's argument that the acts conducted by non-State entities prior to the establishment of the FRY as a State were attributable to that State by virtue of Article 10(2), the Court refrained from adopting a clear cut view on the normative calibre of the provision:

[…] even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle Stated in Article 13 of the said Articles that: 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.' In the present case, the FRY was not bound by the obligations contained in the Genocide Convention until it became party to that Convention. […] The FRY was, therefore, bound by the Genocide Convention only with effect from 27 April 1992. Accordingly, even if the acts prior to 27 April 1992 on which Croatia relies were attributable to a "movement", within the meaning of Article 10 (2) of the ILC Articles, and became attributable to the FRY by operation of the principle set out in that Article, they cannot have involved a violation of the provisions of the Genocide Convention but, at most, only of the customary international law prohibition of genocide. Article 10 (2) cannot, therefore, serve to bring the dispute regarding those acts within the scope of Article IX of the Convention. That conclusion makes it unnecessary for the Court to consider whether Article 10 (2) expresses a principle that formed part of customary international law in 1991-1992 (or, indeed, at any time thereafter), or whether, if it did so, the conditions for its application are satisfied in the present case.[65]

[65] International Court of Justice, *Application of the convention on the prevention and punishment of the crime of genocide (Croatia v. Serbia), Judgment, 3 February 2015*, paras 104-105.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER NAFTA AND THE UNCITRAL RULES)

William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc. v. the Government of Canada

In its 2015 award, the arbitral tribunal constituted to hear the case of *Bilcon of Delaware, Inc. et al. and the Government of Canada* the Tribunal dealt with the rejection of an investment project in Nova Scotia on environmental grounds by the Canadian Federal Government in line with the recommendations of a Joint Review Panel (JRP). The Respondent submitted *inter alia* that that it has not adopted any of the alleged acts, pursuant to Article 11 of the ILC Articles. The Tribunal Stated that the link found between the reports of the JRP and the Minister's final decision suffice to constitute an acknowledgement and adoption for the purposes of Article 11 finally adopted by the International Law Commission:

Even if the JRP were not, by its nature, a part of the apparatus of the Government of Canada, the fact would remain that federal Canada and Nova Scotia both adopted its essential findings in arriving at the conclusion that the project should be denied approval under their environmental laws. Article 11 of the ILC Articles provides as follows: […] It is possible to imagine a case in which a government arrives at the same conclusion as a recommendatory body, but in which the government does so by pursuing investigations and reasoning that are so distinctly its own that it might not be viewed as acknowledging and adopting the conduct of the recommendatory body. On the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP were not one of its organs. […]The Nova Scotia Minister for the Environment informed Mr. Buxton by telephone that he had accepted the first recommendation of the JRP. In a separate letter of the same date, 20 November 2007, Minister Parent Stated that the decision was ultimately for him to make as Minister, but that he had carefully considered the JRP Report and concluded that the project would have likely significant adverse effects after mitigation. Here again, the Tribunal concludes that the link between the findings and recommendations of the JRP and the

Minister's final decision would be sufficient to constitute an acknowledgement and adoption for the purposes of Article 11 of the ILC Articles."[66]

[66] International Arbitral Tribunal (PCA), *In the Matter of Arbitration under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Rules of 1976 between William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, inc. and Government of Canada*, award on jurisdiction and liability (Case No. 2009-04), 17 March 2015, paras 321, 322, 324.

CHAPTER III
BREACH OF AN INTERNATIONAL OBLIGATION

Article 12
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13
International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Renee Rose Levy and Gremcitel S.A. v. Republic of Peru

In its 2015 award, the arbitral tribunal constituted to hear the *Renee Rose Levy and Gremcitel S.A. v. Republic of Peru* case, in order to decide whether it is granted *rationae personae* and *rationae temporis* jurisdiction, referred to article 13 finally adopted by the International Law Commission along with Article 28 of the Vienna Convention of the Law of Treaties which encompasses the principle of non-retroactivity of treaties. The Tribunal stated that when the breach of the obligation under a BIT occurs, the investment must already exist and be covered by the relevant treaty:

> […]it is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host State and a national or company which has acquired its protected investment before the alleged breach occurred. In other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.
> This conclusion follows from the principle of non-retroactivity of treaties,[Article 13] which entails that the substantive protections of the BIT apply to the State conduct that occurred after these protections became applicable to the eligible investment. Because the BIT is at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the

investment when that obligation was allegedly breached.[67]

Adel A Hamadi Al Tamimi v. Sultanate of Oman

In its 2015 award, the tribunal constituted to hear the *Adel A Hamadi Al Tamimi v. Sultanate of Oman* case had to assess when an act of a State may constitute a breach of international law. The tribunal held that conduct of Oman and its instrumentalities undertaken prior to 1st January 2009 would not constitute breach of the FTA, since the latter entered into force after this date. The tribunal made reference to article 13 finally adopted by the International Law Commission and concluded that:

> It bears repeating that the US–Oman FTA does not apply with retroactive effect. Measures taken by Oman prior to 2009, whether constituting a breach of the minimum standard or not, cannot be the subject of the Tribunal's consideration. Article 13 of the ILC Articles on State Responsibility confirms that an act of State will not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs. The Claimant has acknowledged that "while Oman and its instrumentalities engaged in conduct prior to January 1, 2009 that was at times similar to that described in category one, that prior conduct (while undoubtedly a breach of Omani law) is not challenged as a breach of the FTA, which was not in force prior to that date.[68]

Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium

In its 2015 award, the arbitral tribunal constituted to hear the *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium*, concluded that an obviation of the non-retroactivity principle may be possible under specific circumstances:

> In the Decision on Jurisdiction, the tribunal decided that the dispute before it dealt with violations of the provisions of the two BITs, and was different from the disputes previously before the Egyptian courts, and therefore arose after the 2002 BIT came into force. Accordingly there was jurisdiction under the 2002 BIT: [114]-[122]. In the Award on the merits, the tribunal applied the non-retroactivity principle in Article 28 of the Vienna Convention and Article 13 of the ILC Articles on State Responsibility to find that the substantive provisions of the 2002 BIT were to be applied to the judgment of the Egyptian

[67] ICSID, *Renee Rose Levy de Levi v. The Republic of Peru,* Case No. ARB/11/17, award, 9 January 2015, *paras.* 146-147.
[68] ICSID, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Case No. ARB /11/33, award, merits, 3 November 2015, para. 395.

court which was rendered after the 2002 BIT came into force and that the provisions of the 1977 BIT were to be applied to conduct which took place prior to the entry into force of the 2002 BIT, although the tribunal recognised that in practical terms it would make no difference because the protections under the two BITs were essentially identical. The tribunal recognised that: "As a result, the substantive provisions of both treaties will apply, while […] the jurisdiction over the dispute is based on the 2002 BIT only.[69]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER SCC RULES)

Rosinvestco UK LTD v. The Russian Federation

In its 2010 award, the arbitral tribunal constituted to hear the *SCC Rosinvestco UK LTD v. The Russian Federation* case had to determine the time when an investment was made or terminated for the purposes of delimiting its *rationae temporis* jurisdiction. In *SCC Rosinvestco UK LTD v. The Russian Federation* the matter raised by the Respondent is when did the purchase of the share by the claimant, in order to find out whether the court has jurisdiction over the case or not.

While the Tribunal has jurisdiction to determine whether an expropriation of Yukos' assets occurred from 19 December 2004 to 15 August 2007, it may also consider events which occurred prior to this, and prior to Claimant's investment, to the extent that they may assist in understanding the acts that fall within the scope of the Tribunal's jurisdiction rationae temporis. Claimant cites the Commentary to the ILC Articles on State Responsibility (CM-451) in this regard to support its view that a court is not prevented from taking into account earlier actions or omissions for the purpose of establishing the factual basis for a later breach or to provide evidence of intent. (paras. 171 - 172 C-II).[70]

INTERNATIONAL COURT OF JUSTICE

Jurisdictional Immunities of the State (Germany v. *Italy: Greece intervening)*

In its 2012 judgment in the case of Germany v. Italy (Greece intervening), the International Court of Justice addressed the question of whether the law to be applied in the dispute between the parties is that which prescribed the scope and extent of State immunity in 1943-1945, i.e. at the time that the events giving rise to the proceedings in the Italian courts took place, or that which applied at the time the

[69] ICSID, *Ping An Life Insurance Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium,* Case No. ARB/12/29, award, merits, 30 April 2015, para. 194.
[70] ICSID, *Rosinvestco UK LTD v. The Russian Federation,* SCC Arbitration V (079/2005), final award, 12 September 2010, para. 393.

proceedings themselves occurred. This was particularly important in this specific case, as the law of State immunity had undergone significant changes between the 1943-1945 period and the time when the dispute reached the ICJ. The ICJ referred in passing to article 13 of the ILC articles, stating that:

> The Court observes that, in accordance with the principle Stated in Article 13 of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts, the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred. In that context, it is important to distinguish between the relevant acts of Germany and those of Italy. The relevant German acts — which are described in paragraph 52 — occurred in 1943-1945, and it is, therefore, the international law of that time which is applicable to them. The relevant Italian acts — the denial of immunity and exercise of jurisdiction by the Italian courts — did not occur until the proceedings in the Italian courts took place. Since the claim before the Court concerns the actions of the Italian courts, it is the international law in force at the time of those proceedings which the Court has to apply. Moreover, as the Court has Stated (in the context of the personal immunities accorded by international law to foreign ministers), the law of immunity is essentially procedural in nature (*Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo* v. *Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60). It regulates the exercise of jurisdiction in respect of particular conduct and is thus entirely distinct from the substantive law which deter- mines whether that conduct is lawful or unlawful. For these reasons, the Court considers that it must examine and apply the law on State immunity as it existed at the time of the Italian proceedings, rather than that which existed in 1943-1945.[71]

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v. Serbia

In its 2015 judgment, in the case of a potential violation of Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice referred to article 13 of the ILC Articles. In addressing Croatia's argument that the acts conducted by non-State entities prior to the establishment of the FRY as a State were attributable to that State by virtue of Article 10(2), the ICJ acknowledged as a side note that Article 13 of the ILC Articles on State Responsibility reflects a legal principle which remains unaffected by virtue of the application of Article 10(2):

[71] International Court of Justice, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, para. 59.

[…] even if Article 10 (2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle Stated in Article 13 of the said Articles that: 'An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.' In the present case, the FRY was not bound by the obligations contained in the Genocide Convention until it became party to that Convention. […] The FRY was, therefore, bound by the Genocide Convention only with effect from 27 April 1992. Accordingly, even if the acts prior to 27 April 1992 on which Croatia relies were attributable to a "movement", within the meaning of Article 10 (2) of the ILC Articles, and became attributable to the FRY by operation of the principle set out in that Article, they cannot have involved a violation of the provisions of the Genocide Convention but, at most, only of the customary international law prohibition of genocide. Article 10 (2) cannot, therefore, serve to bring the dispute regarding those acts within the scope of Article IX of the Convention. That conclusion makes it unnecessary for the Court to consider whether Article 10 (2) expresses a principle that formed part of customary international law in 1991-1992 (or, indeed, at any time thereafter), or whether, if it did so, the conditions for its application are satisfied in the present case.[72]

[72] International Court of Justice, *Application of the convention on the prevention and punishment of the crime of genocide (Croatia v. Serbia), Judgment, I3 February 2015*, paras 104-105.

Article 14
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Pac Rim Cayman LLC v. Republic of El Salvador

In its 2012 award, the arbitral tribunal constituted to hear the *Pac Rim Cayman LLC v. Republic of El Salvador* case was called to identify the crucial time when the wrongful act was performed. In the instant case Respondent submitted that an abuse of process had taken place as the Claimant changed its nationality in order gain access to the dispute settlement processes that were provided by the relevant BIT. As a result the tribunal had to establish the point in time when the wrongful act was committed on behalf of the Respondent State, as well as whether only one act, or a continuous and/or composite act had taken place. For this reason the tribunal referred to Articles 14 and 15 finally adopted by the International Law Commission. Accordingly, the tribunal stated:

> In the Tribunal's view, on the particular facts of this case as pleaded by the Claimant, an omission that extends over a period of time and which, to the reasonable understanding of the relevant party, did not seem definitive should be considered as a continuous act under international law. The legal nature of the omission did not change over time: the permits and the concession remained non-granted. The controversy began with a problem over the non-granting of the permits and concession; and it remained a controversy over a practice of not granting the mining permits and concession. Accordingly, the Tribunal determines that the alleged de facto ban should be considered as a continuing act under international law.[73]

[73] ICSID, *Pac Rim Cayman LLC v. Republic of El Salvador,* Case No. ARB/09/12, 1 June 2012, decision on respondent's jurisdictional objections, paras 2.92-2.94.

WORLD TRADE ORGANIZATION APPELLATE BODY

European Communities and Certain Member States-Measures Affecting Trade in Large Civic Aircraft

In its 2012 report in the *European Communities and Certain Member States-Measures Affecting Trade in Large Civic Aircraft* case, the WTO Appellate Body upheld the panel's conclusion to exclude all subsidies granted prior to 1 January 1995 from the temporal scope of the dispute. At the same time, the Appellate Body recognized that a proper interpretation of the term "the parties" must also take account of the fact that Article 31(3)(c) of the Vienna Convention on the Law of Treaties is considered an expression of the "principle of systemic integration" which, in the words of the ILC, seeks to ensure that "international obligations are interpreted by reference to their normative environment. According to the Appellate Body:

> …European Union finds support for its position in the Commentaries of the International Law Commission (the "ILC") on Article 28 of the *Vienna Convention* and on the ILC Articles on *Responsibility of States for Internationally Wrongful Acts* (the "ILC Articles"). In particular, the European Union refers to Article 14 of the ILC Articles to argue that "{a} completed act occurs 'at the moment when the act is performed', even though its effects or consequences may continue".107 The European Union also refers to several rulings of the ECtHR (the "ECtHR") and the International Court of Justice (the "ICJ") to support its argument.
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> …Article 14(1) of the ILC Articles stipulates that "{t}he breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue." The United States further highlights that Article 14(3), which, "by contrast, deals with 'an international obligation requiring a State to prevent a given event'—analogous to the obligation in Article 5 of the SCM Agreement not to cause adverse effects ... {and} provides specifically, that a breach of such an obligation 'occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with the obligation. In other words, Article 14(1) distinguishes between *acts* and the *effects* of such acts. Referring to the ILC's Commentary on this provision, the European Union observes that "{a} completed act occurs 'at the moment when the act is performed', even though its effects or consequences may continue." We agree with the European Union that it is important to distinguish between an act and its effects. Article 5 of the *SCM Agreement* is concerned, however, with a "situation" that continues over time, rather than with specific "acts". Thus, although the act of granting a subsidy may have been completed prior to 1 January 1995, the situation of causing adverse effects may continue.[74]

Thus the AB modified the Panel's interpretation of Article 5 of the SCM Agreement and considered that the "causing, through the use of any subsidy, of adverse effects"

[74] WTO Appellate Body *European Communities and Certain Member States-Measures Affecting Trade in Large Civic* Aircraft, WT/DS316/AB/R, 18 May 2011, paras 41, 268, 682, 683, 685.

is covered by article 5 even if it arises out of subsidies granted or brought into existence prior to 1 January 1995, and that a challenge to such subsidies is not *precluded* under the terms of the *SCM Agreement*.

EUROPEAN COURT OF HUMAN RIGHTS

Case of El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment, in *El-Masri v. The Former Yugoslav Republic of Macedonia* case*,* the ECtHR referred to Article 14 as a relevant rule of international law.[75] The case originated in an application lodged by a German national who was subject to a secret rendition operation; he was arrested, held incommunicado, questioned and ill-treated by Respondent's agents in Skopje and subsequently delivered at Skopje airport to CIA agents who tortured him and then transferred him to a secret detention facility in Afghanistan.[76]

Al Nashiri v. Poland

In its 2014 judgment in the *Al Nashiri v. Poland* case, the European Court established that Poland hosted a secret CIA detention camp, and found that Poland breached the European Convention on multiple counts: by allowing and enabling Al Nashiri's secret detention and torture in Poland, by enabling his transfer from Poland to the United States despite the real risk that his rights would be further violated and by failing to conduct an effective investigation leading to the violation of his rights. The Court, *inter alia*, cited Article 14 finally adopted by the international Law Commission as a relevant rule of international law.[77]

Case of Husayn (Abu Zubaydah) v. Poland

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[76] European Court of Human Rights, Grand Chamber, El-Masri v. Former Yugoslav Republic of Macedonia, (Application No. 39630/09), judgment, 13 December 2012, para. 97.
[77] European Court of Human Rights, Fourth Section, *Al Nashiri v. Poland,* (Application No. 28761/11), judgment, 24 July 2014, para. 207.

In its 2014 judgment in the case of *Husayn (Abu Zubaydah) v. Poland*, the ECtHR cited *inter alia* Article 14 finally adopted by the International Law Commission as a relevant rule of international law.[78]

INTER-AMERICAN COURT OF HUMAN RIGHTS

Osorio Rivera and Family v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 26, 2013, I/A Court H. R., Series C No. 274 (2013)

In its 2013 judgment, the Inter-American Court, in the case concerning *Osorio Rivera and Family v. Peru*, considered the distinction between instantaneous acts and acts of a continuing nature. It considered that the latter "extent over the entire period during which the act continues and is not in conformity with the international obligation", citing in a footnote article 14 of the ILC articles.[79]

[78] European Court of Human Rights, Former Fourth Section, *Case of Husayn (Abu Zubaydah) v. Poland* ,(Application No. 7511/13), judgment, 24 July 2014, para. 201.

[79] Inter-American Court of Human Rights, *Osorio Rivera and Family v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment of November 26, 2013, I/A Court H. R., Series C No. 274 (2013)*, para. 30 (See fn. 31).

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

El Paso Energy International Company v. The Argentine Republic

In its 2011 award, the arbitral tribunal constituted to hear the *El Paso Energy International Company v. The Argentine* Republic case examined whether a series of primarily reasonable measures could be seen as a composite act. In order to support its views that the cumulative effect of the measures in question should be regarded as the necessary factor for the procurement of the breach, the Tribunal referred to article 15 finally adopted by the International Law Commission:

> According to the Tribunal, this series of measures amounts to a composite act, as suggested by the International Law Commission in its Articles on State Responsibility (Article 15). […] It cannot be denied that in the matter before this Tribunal the cumulative effect of the measures was a total alteration of the entire legal setup for foreign investments, and that all the different elements and guarantees just mentioned can be analysed as a special commitment of Argentina that such a total alteration would not take place.[80]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Gemplus S.A., SLP S.A.and Gemplus Industrial S.A. de C.V v. The United Mexican States (ICSID Case No. ARB (AF)/04/3); Talsud S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/04/4)

[80] ICSID, *El Paso Energy International Company v.The Argentine Republic,* Case No. 03/15, award, 31 October 2011, paras 515-516.

In its 2010 award, the arbitral tribunal had to determine the starting date of compensation due by the Respondent State towards foreign investors with regard to a series of wrongful measures taken by the former. The Tribunal ruled that the breach consisted of a composite act and subsequently referred to article 15 of the ILC Articles on State Responsibility and the commentaries thereto in order to determine the relevant starting date:

> It is immaterial that the Requisition was also the first of continuing unlawful acts by the Respondent leading to the Revocation on 13 December 2002: Article 15 of the ILC"s Articles on State Responsibility, entitled "Breach consisting of a composite act", provides as follows […] The ILC Commentary to Article 15 States that the breach of an international obligation is dated from the first act in a series of acts which together form the wrongful act. In particular, the ILC Commentary provides that Article 15(2): "[…] deals with the extension in time of a composite act. Once a sufficient number of actions or omissions has occurred, producing the result of the composite act as such, the breach is dated to the first of the acts in the series. The status of the first action or omission is equivocal until enough of the series has occurred to constitute the wrongful act; but at that point the act should be regarded as having occurred over the whole period from the commission of the first action or omission. If this were not so, the effectiveness of the prohibited would thereby be undermined".[81]

EUROPEAN COURT OF HUMAN RIGHTS

Case of El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in *El-Masri v. The Former Yugoslav Republic of Macedonia,* the ECtHR cited article 15 as a relevant rule of international law. The case originated in an application lodged by a German national who was subject to a secret rendition operation; he was arrested, held incommunicado, questioned and ill-treated by FYROM agents in Skopje and subsequently delivered at Skopje airport to CIA agents who tortured him and then transferred him to a secret detention facility in Afghanistan.[82]

Al Nashiri v. Poland

[81] ICSID, *Gemplus S.A., SLP S.A.and Gemplus Industrial S.A. de C.V v. The United Mexican States (ICSID Case No. ARB (AF)/04/3); Talsud S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/04/4)*, Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, award, 16 June 2010, paras 12.44.

[82] European Court of Human Rights, Grand Chamber, *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application No. 39630/09), judgment, 13 December 2012, para. 239.

In its 2014 judgment in the *Al Nashiri v. Poland* case, the European Court established that Poland hosted a secret CIA detention camp, and found that Poland breached the European Convention on multiple counts: by allowing and enabling Al Nashiri's secret detention and torture in Poland, by enabling his transfer from Poland to the United States despite the real risk that his rights would be further violated and by failing to conduct an effective investigation leading to the violation of his rights. . The Court, *inter alia*, cited article 15 finally adopted by the International Law Commission as a relevant rule of international law.[83]

Case of Husayn (Abu Zubaydah) v. Poland

In the case of *Husayn (Abu Zubaydah) v. Poland*, the applicant was transferred to a secret CIA detention facility in Thailand, he was brought to Poland and held there in a secret CIA detention facility. He was then taken to Guantanamo Bay and consecutively to several secret detention facilities in a number of countries before eventually being transferred back to Guantanamo Bay. In reaching its judgment concerning a violation of the European Human Rights Convention, the Court cited *inter alia* Article 15 as a relevant rule of international law.[84]

[83] European Court of Human Rights, Fourth Section, Al Nashiri v. Poland, (Application No. 28761/11), judgment, 24 July 2014, para. 207.

[84] European Court of Human Rights, Former Fourth Section, *Case of Husayn (Abu Zubaydah) v. Poland,*(Application No. 7511/13), judgment, 24 July 2014, para. 201.

CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16
Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

EUROPEAN COURT OF HUMAN RIGHTS

Case of El-Masri v. The Former Yugoslav Republic of Macedonia

In its 2012 judgment in *El-Masri v. The Former Yugoslav Republic of Macedonia,* the ECtHR cited article 16 as a relevant rule of international law. The case originated in an application lodged by a German national who was subject to a secret rendition operation; he was arrested, held incommunicado, questioned and ill-treated by the Respondent's agents in Skopje and subsequently delivered at Skopje airport to CIA agents who tortured him and then transferred him to a secret detention facility in Afghanistan.[85]

Case of al Nashiri v. Poland

In its 2014 judgment in the *Al Nashiri v. Poland* case, the European Court established that Poland hosted a secret CIA detention camp, and found that Poland breached the European Convention on multiple counts: by allowing and enabling Al Nashiri's secret detention and torture in Poland, by enabling his transfer from Poland to the United States despite the real risk that his rights would be further violated and

[85] European Court of Human Rights, Grand Chamber, *El-Masri v. Former Yugoslav Republic of Macedonia*, (Application No. 39630/09), judgment, 13 December 2012, para 223.

by failing to conduct an effective investigation leading to the violation of his rights. . The Court, *inter alia*, cited Article 16 finally adopted by the International Law Commission as a relevant rule of international law.[86] Although the Court did not refer explicitly to article 16 in its reasoning, it effectively based its reasoning on Respondent's in relation to the acts of a third State:.

> 442. Taking into consideration all the material in its possession (see paragraphs 418-439 above), the Court finds that there is abundant and coherent circumstantial evidence, which leads inevitably to the following conclusions:
> (a) that Poland knew of the nature and purposes of the CIA's activities on its territory at the material time and that, by enabling the CIA to use its airspace and the airport, by its complicity in disguising the movements of rendition aircraft and by its provision of logistics and services, including the special security arrangements, the special procedure for landings, the transportation of the CIA teams with detainees on land, and the securing of the Stare Kiejkuty base for the CIA's secret detention, Poland cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory;
> (b) that, given that knowledge and the emerging widespread public information about ill-treatment and abuse of detained terrorist suspects in the custody of the US authorities, Poland ought to have known that, by enabling the CIA to detain such persons on its territory, it was exposing them to a serious risk of treatment contrary to the Convention […].[87]

Case of Husayn (Abu Zubaydah) v. Poland

In the case of *Husayn (Abu Zubaydah) v. Poland*, the European Court of Human Rights took into consideration the ILC Draft Articles as "Relevant International Law" and quoted the text of Article 16.[88]

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[86] European Court of Human Rights, Fourth Section, *Al Nashiri v. Poland,* (Application No. 28761/11), judgment, 24 July 2014, para. 207.
[87] Ibid., para. 442.
[88] European Court of Human Rights, Former Fourth Section, *Case of Husayn (Abu Zubaydah) v. Poland,* (Application No. 7511/13), judgment, 24 July 2014, para. 201.

Article 17
Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) the coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

EUROPEAN COURT OF HUMAN RIGHTS

Case of Di Sarno and Others v. Italy

In the its 2012 judgment in the case of *Di Sarno and Others v. Italy*, the European Court referred explicitly to Article 23 of the ILC Articles in order to reject the Respondent's argument that the wrongfulness of its actions is precluded due to *force* majeure. In the present case eighteen Italian nationals had filed an application against Italy because of the functioning of a public waste disposal service in the region of Campania. Relying on Articles 2 and 8 of the ECHR, the applicants submitted that the State caused serious damage to the environment and endangered their lives by failing to take the requisite measures to guarantee the proper functioning of the service. The applicants further maintained that the public authorities had neglected to inform the people concerned of the risks of living in a polluted area. In rejecting the Respondent's *force majeure* defense, the Court held that:

> The Court notes that from May 2008 the Italian State took various measures and initiatives to overcome the difficulties in Campania, and that the State of emergency declared there on 11 February 1994 was lifted on 31 December 2009. The respondent Government acknowledged the existence of a crisis situation, it is true, but it classified that situation as force majeure. In this connection the Court will simply reiterate the terms of Article 23 of the Articles of the United Nations International Law Commission on State responsibility for internationally wrongful acts, according to which "force majeure is "an irresistible force or ... an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform [an international] obligation". ... Regard also being had to the conclusions of the Court of Justice of the European Union in case no. C-297/08, cited above, the Court considers that the circumstances relied on by the Italian State cannot be considered as force majeure.[89]

[89] European Court of Human Rights, Second Section, *Case of Di Sarno and Others v. Italy* (Application No. 30765/08), judgment, 10 January 2012, para. 111.

Article 24
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) the international obligation in question excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Impegilo S.P.A v. Argentine Republic

In its 2011 award, the arbitral tribunal constituted to hear the Impregilo S.P.A. v. Argentina case, examined Argentina's necessity plea. Argentina sought to preclude the wrongfulness of its actions in light of the severe economic, social and political crisis in the country as of 2000, which called for the enactment of emergency legislation. The tribunal evaluated Argentina's claim under the terms of article finally adopted by the International Law Commission:

> under the standard set by customary international law, which the Parties agree has been codified in Article 25 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts. That standard by definition is stringent and difficult to satisfy.[90]

The arbitral tribunal examined whether the requirements set by the provision have been met, and concluded that this was not the case as Argentina contributed significantly to the "situation of necessity" and thus it could not invoke this plea in the present case.[91]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Sempra Energy International v. Argentine Republic

In its decision concerning the case of *Sempra Energy International v. Argentine Republic*, the Annulment Committee explained the difference between the customary defence of article 25 and the necessity clause in the applicable BIT. The former constitutes a secondary rule while the Non-Precluded-Measures clause of the investment treaty a primary rule. In the examination of each rule by the Tribunal, the later precedes article 25 and the measures falling under the scope of the BIT clause do not constitute a wrongful act in the first place. On the other hand, the customary defence of necessity applies when a wrongful act has been committed, but the State is exempted due to exceptional circumstances. Specifically, the Committee stated:

> Article XI is a special conventional rule, while the State of necessity is a general rule of customary international law. Therefore, Article XI may only be invoked within the framework of the BIT. It is a specific provision, bilaterally agreed upon by the contracting States, which

[90] ICSID, *Impegilo S.P.A v. Argentine Republic,* Case No. ARB/07/17, award, 21 June 2011, paras. 344.
[91] *Ibid*, paras. 358-359.

delimits the scope of the protections contained in that BIT. On the other hand, the State of necessity "can be invoked in any context against any international obligation", except for obligations excluding the possibility of invoking the State of necessity. […]

Finally, the preclusion under Article XI and the State of necessity differ as to their effects. In the case of the State of necessity, Article 27 of the ILC Articles provides that "[T]he invocation of a circumstance precluding wrongfulness ... is without prejudice to ... [t]he question of compensation for any material loss caused by the act in question". If, however, Article XI is found to apply, no compensation is payable since such provision excludes "the operation of the substantive provisions of the BIT.[92]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

El Paso Energy International Company v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the *El Paso Energy International Company v. The Argentine Republic* case, examined whether Argentina's responsibility could be precluded by virtue of the necessity clause in the applicable BIT. In interpreting this clause, the Tribunal had recourse to article 25 and the Commentaries thereto as relevant rules of international law.[93] Further, the tribunal underlined that Article 25(2) codifies a general rule of international law:

Surely one of those general rules of international law is that codified in Article 25(2) of the ILC's Articles on the Responsibility of States, which provides [...]That this rule, as framed by the Commission, forms part of general international law is shown by the case-law of the International Court of Justice [...] in its Judgment in the case of the Gabčikovo-Nagymaros Project.[94]

The tribunal referred to other articles to demonstrate its view that preclusion of wrongfulness should not be taken for granted in cases where the State has created that necessity or has significantly contributed to it:

The general applicability of the rule barring the invocation of necessity when the State concerned itself has created that necessity or has significantly contributed to it is also supported by other provisions of the ILC Articles dealing with the preclusion of wrongfulness. Thus, Article 23 (1) of that text, dealing with force majeure, provides that to invoke the latter, the event creating the necessity must have been "beyond the control of the State." Article 24(2)(a), for its

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92 ICSID, *Ad Hoc* Committee *Sempra Energy International v. Argentine Republic,* Case No. ARB/02/16, decision of annulment, 29 June 2010, *paras* 113, 118.

93 ICSID, *El Paso Energy International Company v. The Argentine Republic,* Case No. 03/15, award, 31 October 2011, para. 552.

94 Ibid., para. 613.

part, relates to "distress" and rules out the preclusion of wrongfulness "if the State has contributed to the situation of distress." Thus, the rule expressed in Article 25(2)(b) of the ILC Articles concerns but one type of situation where "contributory behaviour" on the part of the State involved precludes reference to necessity".[95]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic

In its 2010 decision, the arbitral tribunal constituted to hear the *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic* case , had to determine whether the 2001 economic, political and social crisis in Argentina was severe enough to trigger the necessity defence under article 25. The tribunal held that the prerequisites of such a defence as codified in article 25 form part of customary international law.

The severity of a crisis, no matter the degree, is not sufficient to allow a plea of necessity to relieve a State of its treaty obligations. The customary international law, as restated by Article 25 of the ILC Articles, quoted above, imposes additional strict conditions.[96]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

EDF International S.A., Saur International S.A. and Leon Participationes Argentinas S.A. v. Argentine Republic

In its 2012 award, the arbitral tribunal constituted to hear the *EDF International S.A., Saur International S.A. and Leon Participationes Argentinas S.A. v. Argentine Republic* case, when presented with a state of necessity defence by the Respondent, referred to article 25 as the applicable rule. However, the tribunal hesitated to pronounce on the normative status of the provision and applied it mostly because of the parties' convergence on this particular point.

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[95] Ibid., para. 617.

[96] ICSID, *Suez Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic,* Case No. ARB/03/17, decision on liability, 30 July 2010, para. 236.

[…]the Tribunal notes that both sides rely on ILC Article 25 rather than some different standard of international law […] The Tribunal need take no position on the theoretical question of how far the various aspects of ILC Article 25 codify customary defenses related to necessity. Although addressed by the International Court of Justice, the matter has continued to be subject to scholarly and judicial debate. […] it is sufficient for the Tribunal to note that both sides in this arbitration stipulate that the Tribunal's analysis should take as applicable legal norms the State of Necessity defense presented by the contours articulated in ILC Article 25. Neither side has argued for application of a standard more favorable to host States than the norms of Article 25.[97]

AD HOC COMMITTEE (UNDER THE ICSID CONVENTION)

Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic

The Annulment Committee in the *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic* case was called to decide whether the application of article 25 by the Tribunal was correct, as well as whether the "necessity" clause of the BIT and article 25 have the same meaning and effect. Regarding the second issue, the Committee concluded that it does not have the power to annul the arbitral tribunal's interpretation of the two clauses, since this interpretation is justified. Construing these articles falls under the discretion of the Tribunal, and the Committee can only judge if the Tribunal exceeded its powers or did not explain its conclusions. Concerning the necessity plea under customary international law, the Committee found grounds for annulment of the tribunal's interpretation. In particular, the Committee held that the Tribunal erred in law by omitting to apply the customary rule codified in Article 25 to the facts of the case. In particular:

…The Committee finds that in reaching that conclusion, the Tribunal did not in fact apply Article 25(2)(b) of the ILC Articles (or more precisely, customary international law as reflected in that provision), but instead applied an expert opinion on an economic issue. The Tribunal's process of reasoning should have been as follows. First, the Tribunal should have found the relevant facts based on all of the evidence before it, including the Edwards Report. Secondly, the Tribunal should have applied the legal elements of the Article 25(2)(b) to the facts as found (having if necessary made legal findings as to what those legal elements are). Thirdly, in the light of the first two steps, the Tribunal should have concluded whether or not Argentina had "contributed to the situation of necessity" within the meaning of Article 25(2)(b). For the Tribunal to leap from the

[97] ICSID, *EDF International S.A., Saur International S.A. and Leon Participationes Argentinas S.A. v. Argentine Republic,* Case No. ARB/03/23, award, 11 June 2012), para. 1165, 1167-1168.

first step to the third without undertaking the second amounts in the Committee's view to a failure to apply the applicable law.[98]

[98] ICSID, *Ad Hoc* Committee, *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Case No. ARB/01/3, decision of annulment, 30 July 2010, para. 403.

Article 26
Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:
(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

EDF International S.A., Saur International S.A. and Leon Participationes Argentinas S.A. v. Argentine Republic

In its 2012 award, the arbitral tribunal constituted to the *EDF International S.A., Saur International S.A. and Leon Participationes Argentinas S.A. v. Argentine Republic*, was presented with a state of necessity defence by the Respondent. The Tribunal underlined Argentina's obligation to provide compensation for the damages that the injured parties suffered because of its conduct, independently of the wrongful character of such conduct:

> […] even if Respondent's conduct might be excused under the state of necessity defense, Respondent remains obligated to return to the pre-necessity status quo when possible. Moreover, the successful invocation of the necessity defense does not per se preclude payment of compensation to the injured investor for any damage suffered as a result of the necessity measures enacted by the State. The Tribunal considers that, at some reasonable point in time, Respondent should have compensated Claimants for injury suffered as a result of measures enacted during any arguable period of necessity in late December 2001. As mentioned earlier, ILC Draft Article 27 provides that [t]he invocation of a circumstance precluding wrongfulness [is

without prejudice to] compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists.[99]

[99] ICSID, *EDF International S.A., Saur International S.A. and Leon Participationes Argentinas S.A. v. Argentine Republic,* Case No. ARB/03/23, award, 11 June 2012), paras 1177-1180.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL COURT OF JUSTICE

Jurisdictional Immunities of the State (Germany v. *Italy: Greece intervening)*

In its 2012 judgment in the case of *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* the International Court of Justice made referred to article 30 finally adopted by the International Law Commission, when addressing Germany's submission that Italy should take all steps to ensure that its judicial decisions violating the former's immunity should cease to have effect:

According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing.[100]

Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)

In its 2014 judgment in the *Whaling in the Antarctic* case, the International Court of Justice, although not explicitly referring to article 30, considered Australia's request for cessation and non-repetition of an internationally wrongful act. The Court held that:

> In addition to asking the Court to find that the killing, taking and treating of whales under special permits granted for JARPA II is not for purposes of scientific research within the meaning of Article VIII and that Japan thus has violated three paragraphs of the Schedule, Australia asks the Court to adjudge and declare that Japan shall: "(a) refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII; (b) cease with immediate effect the implementation of JARPA II; and (c) revoke any authorization, permit or licence that allows the implementation of JARPA II". 245. The Court observes that JARPA II is an ongoing programme. Under these circumstances, measures that go beyond declaratory relief are warranted. The Court therefore will order that Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme. 246. The Court sees no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.[101]

[100] International Court of Justice, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, para. 137.

[101] International Court of Justice, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014,* p. 226, para. 244.

Article 31
Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Railroad Development Corporation (RDC)v. The Republic of Guatemala

In its 2012 award, the arbitral tribunal constituted to hear the *Railroad Development Co. v. Guatemala case*, had to determine the appropriate standard of compensation due by the Respondent for a measure which impacted negatively the enjoyment by the investor of its rights, breaching the minimum standard of treatment obligation under the applicable investment treaty. The tribunal referred to the customary nature of article 31 finally adopted by the International Law Commission, holding that:

> CAFTA directs the Tribunal to interpret Article 10.5 on the minimum standard of treatment in accordance with Annex B on customary international law. Under customary international law as reflected in the ILC Articles, "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." (Article 31.1) The Tribunal needs to determine the amount of compensation to be paid on account of the injury suffered by Claimant as a consequence of the breach of the minimum standard of treatment.[102]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine

This case pertained to claims arising out of a series of contracts concluded between a State-owned education institution of Ukraine and the claimants concerning the use of a sailing ship. Disagreements regarding the operation of the contracts, were followed by the Government's decision prohibiting the ship to leave Ukrainian territorial waters. The

[102] ICSID, *Railroad Development Corporation v. Republic of Guatemala,* Case No. ARB/07/23, award, 29 June 2012), para. 260.

Tribunal referred to article 31 as the applicable standard for assessing whether the State is under an obligation to make full reparation to the claimants:

> As stated in Article 31(1) of the ILC Articles on State Responsibility, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." Respondent has presented arguments that its acts did not cause the harm in question under a standard that considers either whether the acts were a "proximate" cause of the harm or whether the harm was a "foreseeable" result of the acts. The Tribunal finds that the action taken by Respondent in ordering that the ship not leave the territorial waters of Ukraine caused the harm to Claimants under either standard discussed by Respondent.[103]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Franck Charles Arif v. Republic of Moldova

In its 2013 award, the arbitral tribunal constituted to hear the *Franck Charles Arif v. Republic of Moldova case* after citing the famous dictum of the Chorzów Factory case, the tribunal quoted in full Article 31 as the provision incorporating the "general obligation of a State guilty of an internationally wrongful act to make reparation".[104] In addition, the tribunal referred explicitly to the text of article 31(2) finally adopted by the International Law Commission with regard to the award of moral damages in international law. It held that:

> […]There is no doubt that moral damages may be awarded in international law (see, for example, Article 31(2) of the International Law Commission's Articles on State Responsibility) although they are an exceptional remedy.[105]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

The Rompetrol Group N.V. v. Romania

In its 2013 award, the arbitral tribunal constituted to hear the *The Rompetrol Group N.V. v. Romania* had to rule whether actual economic damage was an essential component of the Claimant's claims in this arbitration. Without endorsing explicitly their

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[103] ICSID, *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine,* Case No. ARB/08/8, award, 1 March 2012, para. 381.
[104] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para. 559.
[105] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para. 584 (footnotes omitted).

status as customary rules, the Tribunal referred to articles 2 and 31 finally adopted by the International Law Commission in order to conclude that the answer depends on the nature of the primary obligation breached:

…It is convenient therefore to begin with an examination of the draft Articles on State Responsibility, bearing in mind that their status remains that of a draft, although the degree of approval accorded to them by the UN General Assembly and in subsequent international practice amply justifies treating the draft Articles as guidelines for present purposes. […] The crux therefore lies in draft Article 31, and specifically the ILC's commentary to that article (read together with its commentary to draft Article 2). In both places, the ILC States clearly that there is no general rule requiring damage as a constituent element of an international wrong giving rise to State responsibility.[106]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador

In its 2012 interim award -the third regarding jurisdiction and admissibility in this case-, the arbitral tribunal constituted to hear the *Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador* addressed, *inter alia*, the Respondent's objections concerning the admissibility of the Claimant's claims. was that "material damage is essential to the Claimants' claims under the BIT in respect of the 1995 Settlement Agreement". By invoking article 31(2), the tribunal held that moral damages could be the object of the claim:

…In the Tribunal's view, this submission is mistaken as regards the Claimants' claims for non-compensatory relief under the BIT; and it is also mistaken as a matter of legal principle as regards the claim for moral damages (see Article 31(2) of the ILC Articles on State Responsibility: "Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State")."[107]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

[106] ICSID, *The Rompetrol Group N.V. v. Romania*, Case No. ARB/06/3, award, merits 6 May 2013, para. 189.

[107] International Arbitral Tribunal (PCA), *Chevron Corporation and Texaco Petroleum Company v. the Republic of Ecuador***,** *Case* No. 2009-23, paras 4.92-4.93.

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* cases, referred to Article 31 of the ILC Articles in order to determine the extent of the obligation of reparation imposed upon the Respondent:

> As the responsible State, Argentina is, according to the Articles, Art. 31(1), "…under an obligation to make full reparation for the injury caused by [its] internationally wrongful act." "Injury," in this sense, "…includes any damage, whether material or moral, caused by the internationally wrongful act of a State." Thus, there must be a causal link between the internationally wrongful act and the injury for which reparation is claimed. If such a link exists, then Argentina is required to make "full reparation" for the injury it has caused.[108]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia

In its 2015 award the arbitral tribunal constituted to hear the *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* had to calculate the amount of compensation owed to the Claimant. After establishing that the standard of compensation in the BIT applies solely to lawful expropriations, it held that compensation for unlawful acts is due according to the ILC's Articles. The tribunal quoted article 31 and affirmed that it forms the basic principle upon which the system of reparation for unlawful acts is constructed. In particular, it stated:

> It is a basic principle of international law that States incur responsibility for their internationally wrongful acts. This principle is set forth in ILC Article 1, which provides that "[e]very internationally wrongful act of a State entails the international responsibility of that State." The corollary to this principle, which was first articulated by the PCIJ in the often-quoted Chorzów case is that the responsible State must repair the damage caused by its internationally wrongful act. As stated in ILC Article 31: […].[109] (footnote omitted)

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[108] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* Case No. ARB/03/19, Award, 9 April 2015, para. 26.

[109] ICSID, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* Case No. ARB/06/2, award, 16 September 2015, para 327.

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V v. The United Mexican States (ICSID Case No. ARB (AF)/04/3); Talsud S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/04/4)

In its 2010 award concerning two joined arbitrations against the United Mexican States, the arbitral tribunal, in examining the issue of causation between the internationally wrongful act of the State and the injury suffered by the Claimant, referred to Article 31 of the 2001 ILC Articles, in more than one instances, as the codifying norm of the general standard of reparation under customary international law:

> As to causation generally, it is here, as elsewhere in this Award, useful to refer the ILC's draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 31 of the ILC's draft Articles States that a responsible State is obliged to make full reparation for the injury "caused by the intentionally wrongful act of a State". The ILC's Commentary on Article 31 states[110] […] As to the general approach to the assessment of compensation, the Tribunal accepts the general guidance provided by the well-known passage in the PCIJ"s decision in Chorzów Factory as invoked by both the Claimants and the Respondent in these arbitration proceedings […]The Tribunal is likewise guided by Article 31 of the ILC's draft Articles of State Responsibility, being declaratory of international law.[111]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Franck Charles Arif v. Republic of Moldova

In its 2013 award, the arbitral tribunal constituted to hear the *Franck Charles Arif v. Republic of Moldova case* after citing the famous dictum of the Chorzów Factory case, the tribunal quoted in full Article 31 as the provision incorporating the "general obligation of a State guilty of an internationally wrongful act to make reparation".[112] In addition, the tribunal referred explicitly to the text of article 31(2) finally adopted by the International Law Commission with regard to the award of moral damages in international law. It held that:

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[110] *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V v. The United Mexican States (ICSID Case No. ARB (AF)/04/3); Talsud S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/04/4)*ICSID Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, award, 16 June 2010, paras 11.9-11.10.
[111] *Ibid*. para. 11.11
[112] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para. 559.

[…]There is no doubt that moral damages may be awarded in international law (see, for example, Article 31(2) of the International Law Commission's Articles on State Responsibility) although they are an exceptional remedy.[113]

Merrill and Ring Forestry L.P. v. the Government of Canada

In its 2010 award, the arbitral tribunal constituted to hear the case of *Merrill and Ring Forestry L.P. v. Canada*, the arbitral tribunal had to decide whether the respondent has breached its fair and equitable treatment obligation by providing low cost raw material for domestic sawmills in British Columbia at the expense of private log producers. The tribunal ruled that breach of fair and equitable treatment was dependent upon the existence of damages to the investor. To reach this conclusion, the Tribunal relied on the Commentary to article 31 finally adopted by the International Law Commission:

In the commentaries to the International Law Commission Articles on State Responsibility, the issue of whether a wrongful act could exist in the absence of damage being caused was considered. The commentaries state that "whether such elements [damages] are required depends on the content of the primary obligation, and there is no general rule in this respect." [...]in the case of conduct that is said to constitute a breach of the standards applicable to investment protection, the primary obligation is quite clearly inseparable from the existence of damage.[114]

Hrvatska Elektropriveda v. Republic of Slovenia

In its 2015 award, the arbitral tribunal constituted to hear the *Hrvatska Elektropriveda v. Republic of Slovenia* referred to article 31, as the basic principle on the calculation of loss in international law. The tribunal concluded that Slovenia failed to resume deliveries of electricity generated by a nuclear power plant to the claimant, the state-owned national electric company of Croatia:

The Tribunal finds that, consistent with the above principles, the preferred approach to calculate the X factor is the replacement cost approach. The focus compelled by Article 31 and the

[113] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para. 584 (footnotes omitted).
[114] ICSID, *Merill and Ring Forestry L.P. v. the Government of Canada,* under NAFTA and UNCITRAL, award, 31 March 2010, para 245.

Chorzów Factory decision is on the loss suffered to the harmed party;[…].[115]

Further, on the basis of the Commentary to article 31 the judgment took into consideration a criterion of reasonableness when calculating the loss suffered by the claimant, namely whether the latter took a reasonable course of action to replace the lost power:

While deference should be given to the judgment of the HEP dispatchers who made decisions in real time, the Tribunal does require that those judgments were reasonable. In the Commentary to Article 31 of the Articles on State Responsibility, the International Law Commission writes that "[e]ven the wholly innocent victim of wrongful conduct is expected to act reasonably when confronted by the injury.[116]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 19: The M/V "Virginia G" Case (Panama/Guinea-Bissau)

In its 2014 judgment, in the *M/V "Virginia G"* case**,** the International Tribunal for the Law of the Sea, deciding on Panama's reparation claim in relation with the arrest and detention of the M/V Virginia G from the Republic of Guinea-Bissau, referred to Article 31(1). More specifically, it endorsed the position, held by other international tribunals, that the provision reflects customary international law:

The Tribunal observes that the Seabed Disputes Chamber of the Tribunal, in its Advisory Opinion, stated that several of the ILC Draft Articles on State Responsibility are considered to reflect customary international law (see Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 56, para.169). Reference was made in the Advisory Opinion to article 31 of the ILC Draft Articles on State Responsibility (see paragraph 194, Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 10, at p. 62, para. 194).[117]

INTERNATIONAL ARBITRAL TRIBUNAL

Case No. 2010-18: In the Matter of an Arbitration pursuant to an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982 (British Caribbean Bank Limited (Turks & Caicos) v. the Government of Belize)

[115] *Hrvatska Elektropriveda v. Republic of Slovenia,* ICSID Case No. ARB/05/24, award, 17 December 2015, para. 364.
[116] *Ibid*. para. 386.
[117] ITLOS, *N.19: The M/V "Virginia G" Case (Panama/Guinea-Bissau /14 April 2014),* para. 430.

In its 2014 award, the arbitral tribunal constituted to hear case No 2010-18 dealt with the compulsory acquisition from the Government of Belize of certain loan and security agreements of the interest of the British Caribbean Bank. After deciding that the actions of the Government of Belize had violated the rights of the British Caribbean Bank the tribunal had to decide the applicable standard of compensation in international law in the absence of any *lex specialis.* Thus, it referred to the PCIJ Factory at Chorzów case and the relevant ILC Articles, as expressing the applicable customary international standard:

> In the absence of an applicable provision within the Treaty itself, establishing the standard of compensation as a matter of lex specialis, the applicable standard of compensation is that existing in customary international law, as set out by the Permanent Court of International Justice in the Factory at Chorzów case as follows: […] Furthermore, Article 31 of the ILC Articles on State Responsibility provides that:[…] The Tribunal further observes that customary international law (as governs compensation for the Respondent's breach of fair and equitable treatment) and Article 5 of the Treaty (as governs compensation for the Respondent's expropriation) present the Tribunal with different questions.[118]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 21, Request for an advisory opinion submitted by the sub-regional fisheries commission (SRFC)

In its 2015 advisory opinion in the *Request for an advisory opinion submitted by the sub-regional fisheries commission*, the International Tribunal for the Law of the Sea had to rule upon the extent of the flag State's liability for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag. The Tribunal found that neither the UNCLOS nor the Convention on the Determination of the Minimal Conditions for Access and Exploitation of Marine Resources within the Maritime Areas under Jurisdiction of the Member States of the Sub-Regional Commission provides guidance on that issue. The Tribunal then turned to relevant rules of international law on responsibility of States, pursuant to article 293 of the UNCLOS, which allows the application of other rules of international law. The

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[118] International Arbitral Tribunal, No 2010-18: *In The Matter Of An Arbitration Pursuant To The Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of Belize For The Promotion And Protection Of Investments Of 30 April 1982* (Between, The British Caribbean Bank Limited (Turks & Caicos) - And The Government Of Belize) (19 December 2014 Award), paras 288- 289, 292.

Tribunal referred to, *inter alia,* Article 31 of the ILC Articles, stating that it constitutes a rule of general international law.[119]

Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area"

In its 2011 advisory opinion concerning the question of the *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area"*, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea answered the request for an advisory opinion rendered by the Council of the International Seabed Authority the question of *"What are the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area".* The Chamber affirmed that Article 31 incorporates a legal principle of customary nature:

> The obligation for a State to provide for a full compensation or restituto in integrum is currently part of customary international law. This conclusion was first reached by the Permanent Court of International Justice in the Factory of Chorzow Case. This obligation was further reiterated by the International Law Commission. According to article 31, paragraph 1, of the ILC Articles on State Responsibility: The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.[120]
> INTERNATIONAL ARBITRAL TRIBUNAL

Case No. AA 226: In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules (Hulley Enterprises Limited v. Russian Federation-18 July 2014)

In its 2012 judgment, the arbitral tribunal constituted to hear in the case No. AA 226, considering the question of multiple causes for the same damage, referred to article 31 of the ILC Articles and the commentaries thereto to determine the *onus probandi* with respect to the causal relationship between breach and damage:

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[119] ITLOS, Request for an Advisory Opinion submitted by the Sub- regional Fisheries Commission (SRFC), Advisory Opinion, 2 April 2015, para. 144.
[120] ITLOS, Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area" (CASE No 17),* Advisory Opinion, 1 February 2011, para. 194.

In this regard, the Tribunal finds it instructive to look to the ILC Articles on State Responsibility. Article 31 of the ILC Articles provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused." The official commentary to this provision notes that "[…]" (footnotes ommitted). As the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage. Rather, it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate. As the Tribunal considers that Respondent has not demonstrated this with regard to any of the heads of damage identified in the remainder of this Chapter, the Tribunal holds that causation exists between the damage and Respondent's expropriation of Claimants' investment. [121]

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33
Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole,

[121] International Arbitral Tribunal, *In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules Hulley Enterprises Limited (Cyprus) - And - The Russian Federation (18 July 2014)* paras 1774-1775.

depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II
REPARATION FOR INJURY

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Franck Charles Arif v. Republic of Moldova

In its 2013 award, the arbitral tribunal constituted to hear the *Franck Charles Arif v. Republic of Moldova* case, was called to decide upon the international standard of reparation for the injury caused to Claimant. After citing the famous *dictum* of the *Chorzów Factory* case, the tribunal referred to 'the principles of international law' summarised in articles 34, 35, and 36' finally adopted by the International Law Commission. [122]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, referred article 34 of the ILC Articles with regard to the various forms of reparation:

[122] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para 560.

As the Articles state, reparation for an injury caused by an internationally wrongful act "… shall take the form of restitution, compensation, and satisfaction, either singly or in combination…" […].[123]

INTERNATIONAL ARBITRAL TRIBUNAL

Case No. 2010-18: In the Matter of an Arbitration pursuant to an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982 (British Caribbean Bank Limited (Turks & Caicos) v. the Government of Belize)

In its 2014 award, the arbitral tribunal constituted to hear case No 2010-18 dealt with the compulsory acquisition from the Government of Belize of certain loan and security agreements of the interest of the British Caribbean Bank. After deciding that the actions of the Government of Belize had violated the rights of the British Caribbean Bank, and having to decide the applicable law, in the absence of any *lex specialis,* referred to the PCIJ Factory at Chorzów case and relevant the ILC Articles, as, expressing the applicable standard of compensation in customary international law, quoting the text of Article 34.[124]

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area"

In its 2011 advisory opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea answered the request for an advisory opinion rendered by the Council of the International Seabed Authority the question of *"What are the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area".* The Chamber referred to article 34 finally adopted by the International Law Commission as the applicable international

[123] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic,* Case No. ARB/03/19, award, 9 April 2015, para. 27.
[124] International Arbitral Tribunal, No 2010-18: *In The Matter Of An Arbitration Pursuant To The Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of Belize For The Promotion And Protection Of Investments Of 30 April 1982* (Between, The British Caribbean Bank Limited (Turks & Caicos) - And The Government Of Belize), award, 19 December 2014, para. 290.

rule regarding the available form of reparation:

As far as the form of the reparation is concerned, the Chamber wishes to refer to article 34 of the ILC Articles on State Responsibility. It reads:[…].[125]

[125] ITLOS, Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area" (CASE No 17),* Advisory Opinion, 1 February 2011, para. 196.

Article 35
Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER SCC RULES)

Mohammad Ammar Al. Bahloul v. The Republic of Tajikistan

In its 2010 award, the arbitral tribunal constituted to hear the *Mohammad Ammar Al. Bahloul v. The Republic of Tajikistan* case, had to examine claimant's request for specific performance as a form of reparation for the wrongful act committed. The arbitral tribunal, firstly, referred to article 35 to reaffirm that restitution is considered as the primary reparatory form according to international law. However, the tribunal denied the specific performance sought by the Claimant due to the fact that it was materially impossible because other companies had been granted licenses and were operating in the oil and gas sector of the State. According to the tribunal:

> The ILC Articles contemplate restitution as the principal remedy for internationally wrongful conduct. See Article 35 of the ILC Articles. Where damage is not made good by way of restitution, than the ILC Articles envisage monetary compensation for the damage shown to be caused by the misconduct. See Article 35 of the ILC Articles. […] This remedy, however, should not be granted where its implementation is materially impossible. In such case, the ILC Articles would envisage a claim for damages as the available alternative.[126]

[126] International Arbitral Tribunal (SCC), *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, Case No. V (064/2008), award, 8 June 2010, para. 52.

EUROPEAN COURT OF HUMAN RIGHTS

Case of Mr. Pavel Viktorovich Davydov v. Russian Federation

In its 2015 judgment in the case of Davydov v. Russia, the European Court, examined the applicant's request for restoration of his rights that were violated by the quashing of a judgment delivered in his favor. The Court reiterated the legal obligation imposed on the respondent State to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. With regard to that obligation of reparation, the Court referred directly to article 35 finally adopted by the International Law Commission as reflecting a principle of international law. Specifically, the Court held that:

> [t]his obligation reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation that existed before the wrongful act was committed, provided that restitution is not "materially impossible" and "does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.[127]

INTERNATIONAL ARBITRAL TRIBUNAL

Case No. 2010-18: In the Matter of an Arbitration pursuant to an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Belize for the Promotion and Protection of Investments of 30 April 1982 (British Caribbean Bank Limited (Turks & Caicos) v. the Government of Belize) 19 December 2014 Award

In its 2014 award, the arbitral tribunal constituted to hear case No 2010-18 had to examine the legality of the compulsory acquisition of certain loan and security agreements of the interest of the British Caribbean Bank. After deciding that the actions of the Government of Belize had been taken in violation of certain rights of the British Caribbean Bank, the tribunal, in the absence of any *lex specialis,* referred to the PCIJ

[127] European Court of Human Rights, First Section, *Pavel Viktorovich Davydov v. Russia,* (Application No. 18967/07), judgment, 30 January 2015, para. 25.

Factory at Chorzów case and relevant the ILC Articles, as, expressing the applicable standard of compensation in customary international law, quoting the text of Article 35.[128]

INTERNATIONAL COURT OF JUSTICE

Jurisdictional Immunities of the State (Germany v. *Italy: Greece intervening)*

In its 2012 judgment in the *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* case, the International Court of Justice addressed Germany's submission that Italy should take all steps to ensure that its judicial decisions violating the former's immunity should cease to have effect. In this context, the Court invoked both Articles 30 and 35 of the ILC Articles asserting that they constitute applicable rules of international law:

> According to general international law on the responsibility of States for internationally wrongful acts, as expressed in this respect by Article 30 *(a)* of the International Law Commission's Articles on the subject, the State responsible for an internationally wrongful act is under an obligation to cease that act, if it is continuing. Furthermore, even if the act in question has ended, the State responsible is under an obligation to re-establish, by way of reparation, the situation which existed before the wrongful act was committed, provided that re-establishment is not materially impossible and that it does not involve a burden for that State out of all proportion to the benefit deriving from restitution instead of compensation. This rule is reflected in Article 35 of the International Law Commission's Articles.[129]

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[128] International Arbitral Tribunal, No 2010-18: *In The Matter Of An Arbitration Pursuant To The Agreement Between The Government Of The United Kingdom Of Great Britain And Northern Ireland And The Government Of Belize For The Promotion And Protection Of Investments Of 30 April 1982* (Between, The British Caribbean Bank Limited (Turks & Caicos) - And The Government Of Belize) (19 December 2014 Award) para. 291.

[129] International Court of Justice, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, para. 137.

Article 36
Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Hrvatska Elektropriveda v. Republic of Slovenia

In its 2015 award, the arbitral tribunal constituted to hear the *Hrvatska Elektropriveda v. Republic of Slovenia* case, cited in its decision article 36 in order to assess the requests for information by the appointed independent expert and to provide him with some guidelines concerning all the necessary factors he should include in his forthcoming report (factors that affected any damage suffered by HEP as a result of the non-delivery of electricity between the relevant dates). The tribunal further clarified that any compensation due to HEP should: compensate [it] for damage caused thereby' (Article 36 of the International Law Commission's Articles on Responsibility of States for International Wrongful Acts).[130]

Franck Charles Arif v. Republic of Moldova

In its 2013 award, the arbitral tribunal constituted to hear the *Franck Charles Arif v. Republic of Moldova*, after having recalled the text of article 36, held that it depends on the injured State to opt for a specific kind of remedy, implying that the State may choose between the remedies of compensation and restitution.

[130] ICSID, *Hrvatska Elektropriveda v. Republic of Slovenia*, Case No. ARB/05/24, award, 17 December 2015, para. 53.

The Tribunal notes that the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution. On the other hand, restitution is more consistent with the objectives of bilateral investment treaties, as it preserves both the investment and the relationship between the investor and the Host State. [131]

El Paso Energy International Company v. The Argentine Republic

In its 2011 award, the arbitral tribunal constituted to hear the *El Paso Energy International Company v. The Argentine Republic* case, in order to decide on the reparation of the injury, referred to the principle of causation, as embodied in article 31. After addressing the ILC Commentary, the tribunal stated that *the test of causation is whether there is a sufficient link between the damage and the treaty violation"*[132]. Then it proceeded to the quantification of the damages suffered, for which it referred to Article 36. In addition to the dictum in the Chorzów Factory case that "reparation must, as far as possible, wipe out all the consequences of the illegal act.", the tribunal it cited the wording of article 36 when deciding that the compensation to be awarded shall cover all financially assessable damages of the other Party:

> The fair market value […] shall be calculated considering also data and information which became known after 1 January 2002, including after El Paso's sales in 2003, to the extent they are representative of financially assessable damages.[133] [...] Article 36 ("Compensation") of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides [...] after considering the above dictum in the Chorzów Factory case, the ILC's Commentary of this Article concludes that "the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. The reference to "loss of profits" in Article 36(2) confirms that the value of the property should be determined with reference to a date subsequent to that of the internationally wrongful act, provided the damage is "financially assessable", therefore not speculative. The Tribunal shares this position.[134]

Joseph Charles Lemire v. Ukraine

In its 2011 award, the arbitral tribunal constituted to hear the *Joseph Charles Lemire v. Ukraine* affirmed that the responsible State bears the obligation to fully

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[131] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para. 570 (footnotes omitted).
[132] ICSID, *El Paso Energy International Company v.The Argentine Republic,* Case No. 03/15, award, 31 October 2011, para.682.
[133] *Ibid.*, para.704.
[134] *Ibid.,* para. 710.

compensate any material damage caused to the injured party whether that is a state or an individual claimant, and that the latter must prove the causal link between the internationally wrongful act and the damage. The tribunal referred specifically to article 36(1) finally adopted by the International Law Commission.

…The Tribunal agrees with Respondent that it is a general principle of international law that injured claimants bear the burden of demonstrating that the claimed quantum of compensation flows from the host State's conduct, and that the causal relationship is sufficiently close (i.e. not "too remote"). The duty to make reparation extends only to those damages which are legally regarded as the consequence of an unlawful act. Article 36.1 of the ILC Articles reflects this general principle: "The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby" 150 . 156. But beyond this general principle, the ILC Articles remain silent on the particulars of the issue. It is therefore left to judges and arbitrators to define and give content to the specific elements required.

156. The only supplementary guidance is provided in Article 39 of the ILC Articles entitled "Contribution to the injury", which states: "[i]n the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".

Requirements of Causation

157. Proof of causation requires that (A) cause, (B) effect, and (C) a logical link between the two be established.[…][135]

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic* case, recalling its previous decision on liability with regard to this case (Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17), where it had found that the Argentine Republic breached its international obligations under the applicable BITs,, and having examined both the extent of the obligation of reparation of the responsible State as well as its possible forms, determined the appropriate standard of due compensation under international law by referring to Article 36 of the 2001 ILC Articles:

[135] ICSID, *Joseph Charles Lemire v. Ukraine,* Case No. ARB/06/18, award, merits, 28 March 2011, para. 155-157 (footnotes ommitted).

With respect to the meaning of "full reparation" required by Article 31 quoted above, Article 36 of the Articles makes clear that "…the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, in so far as such damage is not made good by restitution…" and that "…the compensation shall cover any financially assessable damage including lost profits insofar as it is established." Thus the basic standard to be applied is that of full compensation (restitutio in integrum) for the loss incurred as a result of the internationally wrongful act. This Statement represents the accepted standard in customary international law and is often supported by reference to the Chorzów Factory Case in which the Permanent Court of International Justice Stated, "[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation." And also: "the essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, so far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Customary international law therefore requires this Tribunal to award "full compensation"oto the Claimants for the injuries caused by Argentina's treaty violations, to seek "to wipe out all the consequences" of Argentina's illegal acts, and to place the Claimants "in the situation which would, in all probability, have existed" if Argentina had not committed its illegal acts.[136]

Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V v. The United Mexican States (ICSID Case No. ARB (AF)/04/3); Talsud S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/04/4)

In its 2010 award, the arbitral tribunal constituted to hear the joint cases of *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V v. The United Mexican States* and *Talsud S.A. v. The United Mexican States* , having referred in general terms to the content and extent of reparation as well as its forms, as codified in Articles 31 and 34 proceeded in a detailed examination of the appropriate standard of compensation, as set forth in Article 36, with regard to both the substantial issues of alleged losses covered by the articulation of the Article, as well as to evidential issues:

In the present case, restitution is not claimed by the Claimants; nor (if it were) would it be appropriate or even possible. The Tribunal is here concerned only with reparation in the form of compensation, as described in Article 36 of the ILC"s Articles. It is for the Claimants, as claimants alleging an entitlement to such compensation, to establish the amount of that compensation: the principle actori incumbit probatio is "the broad basic rule to the allocation of the burden of proof in international procedure". This burden does not rest on a respondent, at least not initially. As to that compensation, Article 36 contains two express requirements, (i) that the damage be "financially assessable", i.e. capable of being evaluated in money, and that it be "established", i.e. such that the remedy be commensurate with the injured party's proven loss and

[136] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic,* Case No. ARB/03/19, Award (April 9, 2015), para. 27 (footnotes ommitted).

thus make it whole in accordance with the general principle expressed in The Chorzów Factory Case as regards compensation for an illegal act […].

It is next necessary to consider the quality of evidential proof required of a claimant to establish a claim, directly or indirectly, based on lost future profits under international law. As explained in the ILC's Commentary on Article 36(2) "... lost profits have not been as commonly awarded in practice as compensation for accrued losses. Tribunals have been reluctant to provide compensation for claims with inherently speculative elements. When compared with tangible assets, profits (and intangible assets which are income-based) are relatively vulnerable to commercial, political and other risks, and increasingly so the further into the future projections are made. In cases where lost future profits have been awarded, it has been where an anticipated income stream has attained sufficient attributes to be considered a legally protected interest of sufficient certainty to be compensable ..."

In this ILC Commentary (with certain materials there cited), there is an emphasis on „certainty" to be established evidentially by a claimant in all cases; but it is clear from other legal materials there cited that the concept of certainty is both relative and reasonable in its application, to be adjusted to the circumstances of the particular case. It suffices to cite two illustrative arbitral decisions, starting with Sapphire (cited in the ILC Commentary on Article 36)[137] (reference in the original) […]

Applying international law to the present case, the Tribunal is influenced by two related factors. First, the Tribunal rejects any argument that because the quantification of loss or damage in the form of lost future profits is uncertain or difficult, that the Claimants should be treated in this case as having failed to prove an essential element of their claims in respect of lost future profits, with the result that their claims for compensation should be dismissed. The Tribunal considers that this approach is not required by the terms of either BIT or international law; and that it would also produce a harsh and unfair result in this case [...]

Second, the Tribunal is mindful of the fact that the Claimant's evidential difficulties in proving their claim for loss of future profits are directly caused by the breaches of the BITs by the Respondent responsible for such loss. If there had been no such breaches, the Concessionaire would have had an opportunity to restore the project, as originally envisaged; and it could then have been seen, as actual facts, whether and, if so, to what extent the restored project would have been profitable for the Concessionaire and, indirectly, the Claimants. The Tribunal considers that, as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent"s wrongs and unfairly defeat the claimant's claim for compensation - as was indicated in the Sapphire award regarding the "behaviour of the author of the damage" (see above). At this point, confronted by evidential difficulties created by the respondent"s own wrongs, the tribunal considers that the claimant's burden of proof may be satisfied to the tribunal"s satisfaction, subject to the respondent itself proving otherwise.[138]

Hrvatska Elektropriveda v. Republic of Slovenia

In its 2015 award, the arbitral tribunal constituted to hear the *Hrvatska Elektropriveda v. Republic of Slovenia* case, addressed the merit of a 'pass on' defense

[137] ICSID, *Gemplus S.A., SLP S.A. and Gemplus Industrial S.A. de C.V v. The United Mexican States (ICSID Case No. ARB (AF)/04/3); Talsud S.A. v. The United Mexican States (ICSID Case No. ARB (AF)/04/4),* Cases Nos. ARB (AF)/04/3 & ARB (AF)/04/4, AWARD (June 16, 2010), paras. 13.80-13.84 (footnotes ommitted).

[138] *Ibid,* paras. 13.91-13.92 (footnotes ommitted).

raised by respondent in the context of calculating the injury suffered by the claimant. In a footnote the tribunal referred to article 36 to the effect that the claimant "can only recover in compensation the damage it actually suffered". It held that:

237. The Tribunal first addresses the classification of the pass-on defence. The essence of the defence is, quite simply, that HEP suffered no loss because any increase in the price ofelectricity was borne by HEP's consumers. It is not correct, therefore, to treat the pass-on defence as a purely theoretical concept when, in reality, it encapsulates a concrete premise.

238. For this reason, the Tribunal does not find the Claimant's arguments that pass-on has never been applied under international law to be apposite. The correct approach is that of the Respondent; namely, to consider the defence within the framework of compensation in international law. While these concepts of compensation are more fully discussed below, it is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered.19 The purpose of damages is to compensate the injured party, not to punish the wrong-doer. The pass-on defence thus raises an essentially factual question: has the Claimant suffered no loss because it recovered any increase in costs through an increase in revenue?

239. The Tribunal, therefore, sees no legal bar to a consideration of the pass-on defence. The authorities on pass-on arising from various domestic competition laws do not bind this Tribunal; nor are they of clear relevance. At best, they show how different states have approached pass-on contentions, typically in the competition law context. However, we are here concerned with a very different legal context and the defence, as it is applied in that area of law, is not relevant here. The relevance of the pass-on concept to this Tribunal is simply in assessing whether any actual damage was suffered and, in that connection, the effect on Croatian consumers is not directly material.[139]

Ioannis Kardassopoulos/Rohn Fuchs v. The Republic Of Georgia

In its 2010 award, the tribunal constituted to hear the *Ioannis Kardassopoulos/Rohn Fuchs v. The Republic of Georgia* case, referred explicitly to article 36 finally adopted by the International Law Commission.[140]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER SCC RULES)

Rosinvestco UK Ltd. v. The Russian Federation

In its 2010 award, the arbitral tribunal constituted to hear the *SCC Rosinvestco UK Ltd. v. The Russian Federation* case, while not referring explicitly to the articles, went into an in-depth interpretation of the Chorzow Factory standard that requires that

[139] ICSID *Hrvatska Elektropriveda v. Republic of Slovenia* Case No. ARB/05/24, Award, 17 December 2015, paras.237-239.(footnotes omitted)
[140] ICSID, *Ioannis Kardassopoulos/Rohn Fuchs v. The Republic Of Georgia,* Case No. ARB/05/18 and ARB/07/15, Award, Merits, 3 March 2010, paras 504-505.

reparation must “wipe out all the consequences of the illegal act and re-establish the situation which could, in all probability, have existed if that act had not been committed”. It stated in this respect that:

As the expropriation took place over a period of almost three years, from 19 December 2004 (the YNG auction) to 15 August 2007 (the last bankruptcy auction), the breach of Respondent's duty may be deemed to occur when the process is completed. The Chorzow Factory standard to "wipe out all the consequences of the illegal act and re-establish the situation which could, in all probability, have existed if that act had not been committed" requires the Tribunal to look at what Yukos would be worth today if its assets had not been unlawfully expropriated. To fix the moment of valuation earlier, in these circumstances, would amount to compensating Claimant as if it had liquidated its investment in Yukos as of that earlier date and transferred its funds to a fixed-rate security. Yukos - and its underlying and valuable oil assets - are what Claimant invested in. In this proceeding, Claimant seeks compensation equal to its share of the real value of the assets that the Russian Federation expropriated from Yukos as of the date of the final award. Re-establishing the situation that would have existed but for the Respondent's unlawful conduct requires an examination of what Yukos would be worth today. [141]

Article 37
Satisfaction

[141] International Arbitral Tribunal, (SCC), *Rosinvestco UK Ltd. v. The Russian Federation,* V (079/2005), final award, 22 December 2010, para. 638.

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia

In its 2015 award, the arbitral tribunal constituted to hear the case of *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of* Bolivia, was asked to issue a declaration pursuant to Article 37 of the ILC Articles on State Responsibility as a form of satisfaction, because according to Claimant the Respondent did not "arbitrate fairly and in good faith". The tribunal found that:

> ...some types of satisfaction as a remedy are not transposable to investor-State disputes. It must be remembered that Part Two of the ILC Articles, including the rules on reparation and in particular Article 37, "does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State."702 That said, the ILC Articles restate customary international law and its rules on reparation have served as guidance to many tribunals in investor-State disputes. In this Tribunal's view, the remedies outlined by the ILC Articles may apply in investor-State arbitration depending on the nature of the remedy and of the injury which it is meant to repair.
>
> The ILC's commentary explains that satisfaction "is not a standard form of reparation, in the sense that in many cases the injury caused by an internationally wrongful act of a State may be fully repaired by restitution and/or compensation."704 It is an exceptional remedy, which is available only "insofar as [the injury] cannot be made good by restitution or compensation. [...]
>
> The traditional forms in which satisfaction has been expressed (such as an apology) are also better-suited to inter-State relations. Conversely, the injury caused to individuals as a result of harassment, threat or violence, as well as reputational harm, can be redressed through monetary compensation.
>
> Accordingly, the type of satisfaction which is meant to redress harm caused to the dignity, honor and prestige of a State, is not applicable in investor-State disputes.
>
> The fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate. Moreover, this is also a power inherent to the Tribunal's mandate to resolve the dispute. [...] As the ILC commentary explains and the ICJ/PCIJ case law

demonstrates, such a declaration can or cannot be a form of satisfaction, depending on the circumstances:

[W]hile the making of a declaration by a competent court or tribunal may be treated as a form of satisfaction in a given case, such declarations are not intrinsically associated with the remedy of satisfaction.

The Tribunal agrees with the Respondent that such a declaration could not be punitive in nature. The Tribunal's mandate is to resolve the dispute before it, not to punish the Parties. That said, as part of the process of settling the dispute, a declaration can be conceived in a manner that is not punitive.[142]

[142] ICSID, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kapl, , ase No. ARB (AF)/04/4), ARB (AF)* Case No. ARB/06/2, award, 16 September 2015, Allan Fosk Kapl, , ase No. ARB

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Ioannis Kardassopoulos/Rohn Fuchs v. The Republic Of Georgia

In its 2010 award, the tribunal constituted to hear the *Ioannis Kardassopoulos/Rohn Fuchs v. The Republic of Georgia* case, considered whether it was appropriate to consider that interest for damages may be awarded by the tribunal with the necessary discretion to ensure full reparation. The tribunal considered that:

> …The tribunal recalls that Article 13(1) of the ECT requires that compensation "shall also include interest at a commercial rate established on a market basis from the date of Expropriation until the date of payment" and contemplated that "Article 2(2) of the Georgia/Israel BIT is silent on the interest applicable to an award of compensation for breach of the FET obligation.[143]

In coming to a conclusion, the tribunal referred to Article 38 of the ILC's Articles on State Responsibility, as well as to the Commentary to Article 38.[144]

SGS Société Géneralé de Surveillance S.A v. The Republic of Paraguay

In its 2012 award, the arbitral tribunal constituted to hear the *SGS Société Générale de Surveillance S.A. v. the Republic of Paraguay*, was presented with questions of appropriate standards of compensation due by the Respondent State to the investor for the former's failure to comply with its contractual obligations with the latter, those obligations being protected by an umbrella clause of the applicable BIT. In this particular

[143] ICSID, *Ioannis Kardassopoulos/Rohn Fuchs v. The Republic Of Georgia,* Case No. ARB/05/18 and ARB/07/15, award, merits, 3 March 2010, para. 659.
[144] *Ibid.* para. 660.

case, with regard to the issue that was raised concerning the starting date of running interest for unpaid monetary obligations, the tribunal after referring to Article 38 (2) of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts, concluded that:

> The virtually universal principle of international law and international arbitration practice in the case of a delayed payment of monetary obligations due is to apply interest as of the date payment became due. This is clear, for example, from the ILC's Articles on State Responsibility." It further elaborated on this point that according to "the Statement in the Commentary to the Articles on State Responsibility that a "failure to make a timely claim for payment is relevant in deciding whether to allow interest." […] However, the "claim" to which the Commentary refers is not the initiation of the dispute but the time when the injured party demanded payment.[145]

Franck Charles Arif v. Republic of Moldova

In its 2013 award, the arbitral tribunal made explicit reference to Article 38 of the ILC Articles in the face of the Claimant's claim to issue an award of interest in order to ensure full reparation of its injury. The tribunal concluded that:

> …Article 38 of the International Law Commission's Articles on State Responsibility confirms that interest will be payable "when necessary in order to ensure full reparation". It also confirms that the general view in international law is in favour of simple and not compound interest, although other commentators suggest the trend in investment arbitration is in favour of compound interest.[146]

Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic

In its 2015 award, the arbitral tribunal constituted to hear the case of *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic*, referred to article 38 in order to determine the appropriate standard of full compensation under international law:

> Moreover, it should be noted that in order to ensure full compensation to injured parties, customary international law authorizes the payment of interest on the principal sum due from

[145] ICSID, *SGS Société GéGS Socide Surveillance S.A v. The Republic of Paraguay,* Case No. ARB/07/29, award, 10 February 2012, paras. 184 - 185.
[146] ICSID, *Franck Charles Arif v. Republic of Moldova,* Case No. ARB /11/23, award, merits, 8 April 2013, para. 617.

the time the amount should have been paid until the date when the payment obligation is actually fulfilled.(footnote in the original referring to Ar. 38 of the 2001 ILC Articles).[147]

Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia

In its 2015 award the tribunal constituted to hear the case of *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, concluded that when evaluating the compensation due, both pre- and post-award interest should be estimated, and that lost profits should also be compensated. The tribunal stated in relation to the question of double recovery:

> Indeed, according to the Commentary to ILC Article 38, "where a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery," because "[a] capital sum cannot be earning interest and notionally employed in earning profits at one and the same time." However, the ILC Commentary goes on to explain that "interest may be due on the profits which would have been earned but which have been withheld from the original owner." Consequently, if interest is applied to past net cash flows (i.e., the cash flows that would have been earned between 23 July 2004 and 30 June 2013 but were withheld from the Claimants due to Bolivia's expropriatory measure) as of the date on which those cash flows were due, there is no double- counting.[148]

Concerning the applicable interest rate, the tribunal had to decide between compound or simple interest rate. In order to determine whether the relevant Bolivian national legislation or international law was applicable, the tribunal resorted to Article 42 of the ICSID Convention. Finally, it concluded that since the wrongful act constitutes a breach of the BIT, and not a of a contract, international law should be applied. Therefore, the Tribunal resorted once more to Article 38 of the ILC's Articles on State Responsibility only to deviate from it. In particular it held that:

> …The Tribunal is aware that the Commentary to ILC Article 38, which the Respondent also invokes, States that "[t]he general view of courts and tribunals has been against the award of compound interest." Yet, a review of arbitral decisions shows that compound interest has been deemed to "better reflect contemporary financial practice" and to constitute "the standard of

[147] ICSID, *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic,* Case No. ARB/03/19, award, 9 April 2015, para. 27 (footnotes omitted).
[148] ICSID, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia,* Case No. ARB/06/2, award, September 16, 2015, para. 514.

international law in expropriation cases." The view that compound interest better achieves full reparation has been adopted in a large number of decisions and is shared by this Tribunal. As to the periodicity, the Tribunal opts for compounding on a yearly basis.[149]

Hrvatska Elektropriveda v. Republic of Slovenia

In its 2015 award, the arbitral tribunal constituted to hear the *Hrvatska Elektropriveda v. Republic of Slovenia* case, quoted the commentary to article 38(1) of the Articles:

The Tribunal begins by recalling that the purpose of interest is to "ensure full reparation" […] The Commentary to the Articles on State Responsibility States: As a general principle, an injured State is entitled to interest on the principal sum representing its loss, if that sum is quantified as at an earlier date than the date of the settlement of, or judgment or award concerning, the claim and to the extent that it is necessary to ensure full reparation. This principle of full reparation thus guides the Tribunal in making its finding on interest.[150]

INTERNATIONAL ARBITRAL TRIBUNAL

Case No. AA 226: In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules (Hulley Enterprises Limited v. Russian Federation)

In 2014 award, the arbitral tribunal constituted to hear the case of *Hulley Enterprises Limited v. Russian Federation)*, concluded that the ILC Articles on State responsibility did not address in a conclusive manner the question of how interest should be determined and therefore that arbitral tribunals enjoy a certain latitude in choosing the method according to which they calculate interest rates. The tribunal thus held that:

1678. Neither the Treaty nor the ILC Articles on State Responsibility provide specific rules regarding how interest should be determined. In addition, as the Tribunal has found, the practice of past tribunals is varied and inconsistent and does not provide clear guidance. Thus, as is well established, the Tribunal has a wide margin of discretion to determine the rate of interest applicable and whether it should be simple or compound. [151]

[149] Ibid., *para*. 524.
[150] ICSID *Hrvatska Elektropriveda v. Republic of Slovenia* Case No. ARB/05/24, award, 17 December 2015, paras.539-540 (footnotes omitted).
[151] International Arbitral Tribunal, *In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules*

Hulley Enterprises Limited (Cyprus) - And - The Russian Federation, award, 18 July 2014, para 1678.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States

In its 2012 award the arbitral tribunal constituted to hear the case of *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States* was called to examine whether the Claimants had contributed to the injury caused. The tribunal referred to the principle of causation in order to decide if the compensation owed by Respondent should be reduced or even extinguished. The tribunal stated in particular regarding Article 39 of the ILC's Article on State Responsibility:

> As to causation generally, it is here, as elsewhere in this Award, useful to refer the ILC's draft Articles on Responsibility of States for Internationally Wrongful Acts. Article 31 of the ILC's draft Articles States that a responsible State is obliged to make full reparation for the injury "caused by the intentionally wrongful act of a State.
>
> [...] Article 39 of the ILC's Articles on State Responsibility precludes full or any recovery, where, through the wilful or negligent act or omission of the claimant State or person, that State or person has contributed to the injury for which reparation is sought from the respondent State. The ILC's Commentary on Article 39 refers to like concepts in national laws referred to as "contributory negligence", "comparative fault", "faute de la victime" etc. The common feature of all these national legal concepts is, of course, a fault by the claimant which has caused or contributed to the injury which is the subject-matter of the claim; and such a fault is synonymous with a form of culpability and not any act or omission falling short of such culpability.
>
> The Tribunal determines that none of the Claimants knew or could reasonably have known of Mr Cavallo's past (assuming even, for present purposes, that his past is as was alleged by the Respondent). It was certainly not known at the material time by the Respondent itself, which (as a State) had privileged access to the Government of Argentina and, having made an appropriate inquiry to Argentina before granting the Concession to the Concessionaire, received an anodyne response as to Mr Cavallo's antecedents. If that little was achieved by the Respondent as a State receiving assistance from a State, how much less could have become known by the Claimants. Indeed, it was accepted by Counsel for the Respondent on the first day, and again on the final day, of the main hearing that the Claimants did not and could not have known of the criminal allegations made against Mr Cavallo. In short, there is no culpability attaching to the Claimants.

In the Tribunal's view, these facts suffice to demonstrate the absence of any fault by any of the Claimants; and, without such fault, this defence advanced by the Respondent must fail in its entirety on the facts of the present case.

[…] Accordingly, the Tribunal determines that the Respondent caused the losses suffered by the Claimants as assessed later in this Award, without any reduction for "contributory negligence" or other fault, as alleged by the Respondent.[152]

Joseph Charles Lemire v. Ukraine

In its 2011 award, the arbitral tribunal constituted to hear the *Joseph Charles Lemire v. Ukraine*, after having referred to Article 36.1 of the ILC Articles, noted that the total amount of compensation will be determined by taking into account additional criteria, such as the extent to which the injured party has contributed to the cause of damage. In coming to such a conclusion, the tribunal relied on Article 39 of the Articles on State Responsibility and stated that:

But beyond this general principle, the ILC Articles remain silent on the particulars of the issue. It is therefore left to judges and arbitrators to define and give content to the specific elements required. The only supplementary guidance is provided in Article 39 of the ILC Articles entitled "Contribution to the injury".[153]

INTERNATIONAL ARBITRAL TRIBUNAL

Case No. AA 226: In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules (Hulley Enterprises Limited v. Russian Federation-18 July 2014)

In 2014 award, the arbitral tribunal constituted to hear the case of *Hulley Enterprises Limited v. Russian Federation)*, referred to Article 39 of the Articles on State Responsibility and the relevant parts of the Commentary:

Extracts of the ILC's Commentary to Article 39 are pertinent, including the following: "Article 39 deals with the situation where damage has been caused by an internationally wrongful act of a State, which is accordingly responsible for the damage in accordance with

[152] ICSID*, Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v. United Mexican States,* Case No. ARB (AF)/04/3 & ARB (AF)/04/4, award, ,merits, 16 June 2010, paras. 11.9-11.16 (footnotes omitted).
[153] ICSID, *Joseph Charles Lemire v. Ukraine*, Case No. ARB/06/18, award, merits, 28 March 2011, *para.* 156.

Articles 1 and 28, but where the injured State, or the individual victim of the breach, has materially contributed to the damage by some willful or negligent act or omission."[154]

[…]

1633. Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary, the Tribunal must now determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the CyprusRussia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain. As the Tribunal noted earlier in this chapter, an award of damages may be reduced if the victim of the wrongful act of the respondent State also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility.[155]

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[154] International Arbitral Tribunal, *In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules Hulley Enterprises Limited (Cyprus) - And - The Russian Federation (18 July 2014)*, para. 1596

[155] *Ibid.* para. 1633.

CHAPTER III
SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

EUROPEAN COURT OF HUMAN RIGHTS

Case of Al Nashiri v. Poland

In its 2014 judgment in the *Al Nashiri v. Poland* case, the European Court established that Poland hosted a secret CIA detention camp, and found that Poland breached the European Convention on multiple counts: by allowing and enabling Al Nashiri's secret detention and torture in Poland, by enabling his transfer from Poland to the United States despite the real risk that his rights would be further violated and by failing to conduct an effective investigation leading to the violation of his rights. .

The Court referred, *inter alia*, to Articles 41 § 1 and 41 § 2 of the ILC Articles in its reasoning.[156]

Moreover, pursuant to Articles 41 § 1 and 41 § 2 of the ILC Articles, States were subject to additional obligations to refrain from co-operation in internationally wrongful acts where those acts amounted to "a serious breach", that is " a gross or systemic failure" by a State to fulfil "an obligation arising under a peremptory norm of general international law. These obligations arose, in the view of AI and the ICJ, in relation to the HVD Programme since it involved violations of the prohibitions of torture, enforced disappearances and prolonged arbitrary detention, which were violations of *jus cogens* norms.[157]

INTERNATIONAL COURT OF JUSTICE

Jurisdictional Immunities of the State (Germany v. *Italy: Greece intervening)*

In its 2012 judgment in the case of Germany v. Italy (Greece intervening), the International Court of Justice addressed the question of the potential conflict between according immunity by one State to another under customary international law and norms of a *jus cogens* nature. In passing its judgment the ICJ referred explicitly to article 41 of the articles:

93. This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the rules of the law of armed conflict which prohibit the murder of civilians in occupied territory, the deportation of civilian inhabitants to slave labour and the deportation of prisoners of war to slave labour are rules of *jus cogens*, there is no conflict between those rules and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdic- tion in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful. That is why the application of the con- temporary law of State immunity to proceedings concerning events which occurred in 1943-1945 does not infringe the principle that law should not be applied retrospectively to determine matters of legality and responsibility (as the Court has explained in paragraph 58 above). For the same reason, recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining

156 European Court of Human Rights, Fourth Section, *Al Nashiri v. Poland,* (Application No. 28761/11), judgment, 24 July 2014, para. 207.
157 Ibid., para. 446-450.

that situation, and so cannot contravene the principle in Article 41 of the International Law Commission's Articles on State Responsibility.[158]

Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion

In its 2010 advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, the Court, while not referring explicitly to the ILC articles, affirmed that violations of jus cogens norms can carry particular consequences for the actors involved:

> Several participants have invoked resolutions of the Security Council condemning particular declarations of independence: see, inter alia, Security Council resolutions 216 (1965) and 217 (1965), concerning Southern Rhodesia; Security Council resolution 541 (1983), concerning northern Cyprus; and Security Council resolution 787 (1992), concerning the Republika Srpska. The Court notes, however, that in all of those instances the Security Council was making a determination as regards the concrete situation existing at the time that those declarations of independence were made;the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character *(jus cogens*).[159]

[158] International Court of Justice, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, para. 93.
[159] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, I.C.J. Reports 2010, p. 410, para. 81.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or
(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:
(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area"

In its 2011 advisory opinion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea answered the request for an advisory opinion rendered by the Council of the International Seabed Authority the question of *"What are the Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area"*. In support of its finding that *the Authority* is entitled to claim compensation (in case of damage to the Area and its resources), the SDC stipulated that:

…article 137, paragraph 2, of the Convention, which States that the Authority shall act "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the

high seas and in the Area", quoted that"..... reference may be made to article 48 of the ILC Articles on State Responsibility, which provides: Any State other than an injured State is entitled to invoke the responsibility of another State.....if: (a)....., or (b) the obligation breached is owed to the international community as a whole.[160]

INTERNATIONAL COURT OF JUSTICE

Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)

In its 2012 judgment in the *Belgium v. Senegal* case, the International Court of Justice concluded that Belgium had standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under the Convention against Torture. The Court held that "the States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity."[161] Based on the fact that none of the persons that filed the complaint against ex-dictaror Hissene Habré in Belgium had Belgian nationality at the time when the acts were committed, Senegal contested Belgium's standing in the present case. As a result, the International Court of Justice had to consider whether Belgium had standing as 'a State other than an injured State' under Art. 48 (1) (a) ILC Draft Articles, although it did not refer explicitly to the said article.

The Court thus confirmed that the treaty obligation to conduct a preliminary inquiry into the facts (obligation to investigate) and the obligation to submit the case to the competent authorities for prosecution (obligation to prosecute) set forth in Arts 6 (2) and 7 (1) of the Convention against Torture constituted *obligations erga omnes partes*. It held that '[t]he States Parties to the Convention have a common interest to ensure… that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity… That common interest implies that the obligations in question are

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160 ITLOS, Seabed Disputes Chamber, *Case No. 17, Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the "Area",* Advisory Opinion, 1 February 2011, para. 180.

161 International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, para. 68.

owed by any State Party to all the other States Parties to the Convention'.[162] Thus, according to the Court, '[a]ll the States parties "have a legal interest" in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33) and are entitled to request compliance with the Convention against Torture of another State Party, starting from the date when both States are parties to the Convention (*Judgment* para. 68) affirming that no 'special' legal interest is required for that purpose. The Court also held that the obligations of a State party are triggered by the presence of the alleged offender, regardless of his/her or the victims'' nationality, in its territory. Although the Court did not refer explicitly to article 48 finally adopted by the International Law Commission, it accepted the admissibility of Belgium's claims, as claims '*erga omnes partes*':

> …The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim. It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*.[163]

[162] *Ibid*., para. 68.

[163] *Ibid*., para. 69.

CHAPTER II
COUNTERMEASURES

Article 49
Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

INTERNATIONAL COURT OF JUSTICE

Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)

In its 2011 judgment in the *Application of the Interim Accord of 13 September 1995* case, the International Court of Justice, although not explicitly referring to the ILC articles assessed Respondent's arguments that its actions could be justified as countermeasures under the said articles. In reaching its conclusion the Court held that:

As described above (see paragraphs 120 and 121), the Respondent also argues that its objection to the Applicant's admission to NATO could be justified as a proportionate countermeasure in response to breaches of the Interim Accord by the Applicant. As the Court has already made clear, the only breach which has been established by the Respondent is the Applicant's use in 2004 of the symbol prohibited by Article 7, paragraph 2, of the Interim Accord. Having reached that conclusion and in the light of its anaysis at paragraphs 72 to 83 concerning the reasons given by the Respondent for its objection to the Applicant's admission to NATO, the Court is not persuaded that the Respondent's objection to the Applicant's admission was taken for the purpose of achieving the cessation of the Applicant's use of the symbol prohibited by Article 7, paragraph 2. As the Court noted above, the use of the symbol that supports the finding of a breach of Article 7, paragraph 2, by the Applicant had ceased as of 2004. Thus, the Court rejects the Respondent's

claim that its objection could be justified as a countermeasure precluding the wrongfulness of the Respondent's objection to the Applicant's admission to NATO.[164]

[164] International Court of Justice, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December 2011, I.C.J. Reports 2011*, p. 644, para. 164.

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) obligations for the protection of fundamental human rights;

(*c*) obligations of a humanitarian character prohibiting reprisals;

(*d*) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) under any dispute settlement procedure applicable between it and the responsible State;

(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) the internationally wrongful act has ceased; and

(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54
Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

Article 55
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

WORLD TRADE ORGANIZATION PANEL AND APPELLATE BODY

United States – Definite Anti-Dumping and Countervailing Duties on Certain Products from China

In its 2010 report in the *United States – Definite Anti-Dumping and Countervailing Duties on Certain Products from China* case, the panel considered a dispute concerning definitive anti-dumping and countervailing duties imposed by the United States as a result of four anti-dumping and four countervailing duty investigations conducted by the United States Department of Commerce ("USDOC"), covering certain products from China. In assessing whether these determinations were consistent with the United States' obligations under article 1.1 of the SCM Agreement, the panel considered China's arguments on whether certain State Owned Enterprises ("SOES") and State Owned Commercial Banks ("SOCBS") were public bodies under the ILC Articles.

More specifically, China argued that the Articles constitute "relevant rules of international law applicable in the relations between the parties" in the sense of Article 31(3)(c) of the Vienna Convention, and that Article 5 of the articles finally adopted by the International Law Commission must have been "taken into account" in the analysis of the term "public body". The panel rejected these arguments by stating that:

(…) in our view, China significantly overstates the status that has been accorded to the Draft Articles where they have been referred to by panels and the Appellate Body. Indeed, in not a single instance of such citations identified by China has a panel or the Appellate Body identified the Draft Articles as "relevant rules of international law applicable in the relations

between the parties" in the sense of Article 31(3)(c) of the Vienna Convention, such that they should be "taken into account together with the context" when interpreting the treaty. Rather, in our view, the various citations to the Draft Articles have been as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements. In particular, while in some cases the Draft Articles have been cited as containing similar provisions to those in certain areas of the WTO Agreement, in others they have been cited by way of contrast with the provisions of the WTO Agreement, as a way to better understand the possible meaning of the provisions of the WTO Agreement. In all cases, however, the exercise undertaken by these panels and the Appellate Body has been to interpret the WTO Agreement on its own terms, i.e., on the basis of the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty.[165]

And thus concluded:

We find no basis for the assertion that as a general matter the Appellate Body and panels have found that the Draft Articles must be "taken into account" as "rules of international law applicable in the relations between the parties" in interpreting the WTO Agreement...[166]

On 11 March 2011, regarding the aforementioned dispute between the United States of America and China, on the interpretation of the term of "public body", the Appellate Body Stated the following:

On the application *of the International Law Commission Articles on Responsibility of States for Internationally Wrongful Acts,* the Appellate Body Stated the following: " To the extent that Articles 4, 5, and 8 of the ILC Articles concern the same subject matter as Article 1.1(a)(1) of the SCM Agreement, they would be "relevant" in the sense of Article 31(3)(c) of the Vienna Convention. With respect to the third requirement, the question is whether the ILC Articles are "applicable in the relations between the parties". We observe that Articles 4, 5, and 8 of the ILC Articles are not binding by virtue of being part of an international treaty. However, insofar as they reflect customary international law or general principles of law, these Articles are applicable in the relations between the parties.[167]

Moreover, on the rules of attribution provided by the ILC articles and the SCM Agreement, the Appellate Body considered that:

Both Article 1.1(a)(1), on the one hand, and Articles 4, 5, and 8 of the ILC Articles, on the other hand, set out rules relating to the question of attribution of conduct to a State. At the same time, we note certain differences in the approach reflected in these two sets of rules. The connecting factor for attribution pursuant to the ILC Articles is the particular conduct, whereas, the connecting factors in Article 1.1(a)(1) of the SCM Agreement are both the particular conduct and the type of entity. Under the SCM Agreement, if an entity is a public body, then its conduct is attributed directly to the State, provided that such conduct falls within the scope of subparagraphs (i)-(iii), or the first clause of subparagraph (iv).

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[165] WTO Panel Report, *United States – Definite Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, 22 October 2010, para. 8.87.

[166] *Ibid*., para. 8.89.

[167] WTO, Appellate Body Report, *United States – Definite Anti-Dumping and Countervailing Duties on Certain Products from China,* WT/DS379/AB/R 11 March 2011, para. 308.

Conversely, if an entity is a private body in the sense of Article 1.1(a)(1)(iv), its conduct can be attributed to the State only indirectly through a demonstration of entrustment or direction of that body by the government or a public body. By contrast, the sole basis for attribution pursuant to the ILC Articles is the particular conduct at issue. Articles 4, 5, and 8 each stipulates the conditions in which conduct shall be attributed to a State.[168]

Especially regarding the Article 5 of the ILC Draft Articles, the Appellate Body noted that:

More specifically, however, with regard to Article 5 of the ILC Articles, we note that despite certain differences between the attribution rules of the ILC Articles and those of the SCM Agreement, our above interpretation of the term "public body" coincides with the essence of Article 5. We have indicated that being vested with, and exercising, authority to perform governmental functions is a core feature of a "public body" in the sense of Article 1.1(a)(1). Here, we note that the commentary on Article 5 explains that Article 5 refers to the true common feature of the entities covered by that provision, namely that they are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority. The commentary also States that the existence of a greater or lesser State participation in its capital, or ownership of its assets are not decisive criteria for the purpose of attribution of the entity's conduct to the State. This corresponds to our above interpretation of the term "public body" in Article 1.1(a)(1). As we have said above, being vested with governmental authority is the key feature of a public body. State ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority.[169]

Regarding the matter whether the articles adopted by the International Law Commission reflect customary law and the panel's statement on this matter the Appellate Body considered that:

…We are puzzled by the Panel's Statement that the ILC Articles have been cited by panels and the Appellate Body "as conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and object and purpose of the relevant covered Agreements. The Panel elaborated that, while in some WTO disputes the ILC Articles "have been cited as containing similar provisions to those in certain areas of the WTO Agreement, in others they have been cited by way of contrast with the provisions of the WTO Agreement, as a way to better understand the possible meaning of the provisions of the WTO Agreement". The Panel considered this to indicate that panels and the Appellate Body have not considered the ILC Articles to constitute rules of international law in the sense of Article 31(3)(c).To us, this demonstrates the opposite. If, as the Panel States, certain ILC Articles have been "cited as containing similar provisions to those in certain areas of the WTO Agreement" or "cited by way of contrast with the provisions of the WTO Agreement", this evinces that these ILC Articles have been "taken into account" in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases.[170]

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[168] *Ibid*., para.309.
[169] *Ibid*.,, para.310.
[170] *Ibid.,* para.313.

Finally, on the matter if the ILC Articles constitute *lex specialis* and therefore should be applied in this case, the Appellate Body noted the following:

> […] As we see it, Article 55 of the ILC Articles does not speak to the question of whether, for the purpose of interpreting Article 1.1(a)(1) of the SCM Agreement, a panel or the Appellate Body can take into account provisions of the ILC Articles. Article 55 stipulates that "[t]hese articles do not apply where ...". Article 55 addresses the question of which rule to apply where there are multiple rules addressing the same subject matter. The question in the present case, however, is not whether certain of the ILC Articles are to be applied, that is, whether attribution of conduct of the SOEs and SOCBs at issue to the Government of China is to be assessed pursuant to the ILC Articles instead of Article 1.1(a)(1) of the SCM Agreement. There is no doubt that the provision being applied in the present case is Article 1.1(a)(1). Rather, the question is, whether, when interpreting the terms of Article 1.1(a)(1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements. Thus, the treaty being applied is the SCM Agreement, and the attribution rules of the ILC Articles are to be taken into account in interpreting the meaning of the terms of that treaty. Article 55 of the ILC Articles does not speak to the issue of how the latter should be done.[171]

WORLD TRADE ORGANIZATION APPELLATE BODY

Peru – Additional Duty on Imports of Certain Agricultural Products

In its 2015 report in the *Additional Duty on Imports of Certain Agricultural Products* case, the WTO Appellate Body considered the panel's report regarding a complaint by Guatemala with respect to a measure (i.e. additional duties resulting from a "Price Range System") imposed by Peru affecting imports of certain agricultural products. Initially, the panel had held that Peru acted inconsistently with provisions of the Agreement on Agriculture and the GATT 1994 and recommended that Peru bring the challenged measure into conformity with its obligations under those agreements. Peru appealed certain issues of law and legal interpretations developed by the Panel.

Before the Appellate Body, Peru claimed in sum that, firstly, proceedings initiated by Guatemala were conducted contrary to good faith. Second, it challenged the interpretation and application by the Panel of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. Third, Peru claimed that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture by failing to take into account the Free Trade Agreement between Peru and Guatemala and ILC articles 20 and 45, in accordance with Article 31(3) of the Vienna Convention of 1969

[171] *Ibid*., para. 316.

on the Law of Treaties. The Appellate body rejected the aforementioned claims and upheld the Panel's decision. Aspects of Peru's appeal concerning the FTA and the ILC Articles were examined in respect of the last clam. More specifically, Peru's argued that:

> the FTA and ILC Articles 20 and 45 constitute relevant rules of international law applicable in the relations between the parties within the meaning of Article 31(3)(c) of the Vienna Convention and that, in addition, the FTA constitutes a "subsequent agreement between the parties" under Article 31(3)(a). In this respect, Peru's arguments required the Appellate Body to address the threshold question of whether the FTA and ILC Articles 20 and 45 are instruments that could be taken into account "together with the context" under Article 31(3)(a) and (c) of the Vienna Convention in the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994.[172]

The Appellate Body held that:

> Paragraph 9 of Annex 2.3 to the FTA and ILC Articles 20 and 45 "do not provide "relevant" interpretative guidance in this respect.

In other words, it did not see how the FTA and ILC Articles 20 and 45 can be considered as rules concerning the same subject matter as Article 4.2 and Article II:1(b), or as bearing specifically upon the interpretation of these provisions."[173] Thus, without reaching the questions of whether the FTA and ILC Articles 20 and 45 are "rules of international law applicable in the relations between the parties" within the meaning of Article 31(3)(c) of the Vienna Convention and whether the FTA is an "agreement" within the meaning of Article 31(3)(a), the Appellate Body disagreed with Peru that the FTA and ILC Articles 20 and 45 are "relevant" rules of international law within the meaning of Article 31(3)(c) and that the FTA is a subsequent agreement "regarding the interpretation" of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article 31(3)(a) of the Vienna Convention on the Law of Treaties.[174]

INTERNATIONAL ARBITRAL TRIBUNAL

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[172] WTO Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, 20 July 2015, para. 5.98.
[173] *Ibid*. para. 5.103.
[174] I*bid*. para. 5.104.

Case No. AA 226: In the Matter of an Arbitration before a Tribunal Constituted in Accordance with Article 26 of the Energy Charter Treaty and the 1976 UNCITRAL Arbitration Rules (Hulley Enterprises Limited v. Russian Federation-18 July 2014)

In 2014 award, the arbitral tribunal constituted to hear the case of *Hulley Enterprises Limited v. Russian Federation)*, found that the Articles on State Responsibility are primarily concerned with claims between States but may also serve as guidance in cases between States and individuals under certain circumstances. The tribunal held that:

> 113. The substantive law to be applied by the Tribunal consists of the substantive provisions of the ECT, the Vienna Convention on the Law of Treaties ("VCLT"), and applicable rules and principles of international law, including those authoritatively set out in the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations ("ILC Articles on State Responsibility") In addition to the foregoing sources, the national law of the Russian Federation is relevant with regard to certain issues. […] The full text of the ILC Articles, along with parts of the official commentary, was also submitted by Respondent. See Exhs. R-1031 and R-4235. The Tribunal is aware that Part II of the ILC Articles on State Responsibility, which sets out the consequences of internationally wrongful acts, is concerned with claims between States and may not directly apply to cases involving persons or entities other than States. That being said, the ILC Articles reflect customary international law in the matter of State responsibility, and to the extent that a matter is not ruled by the ECT and there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles on State Responsibility for guidance. The Tribunal further notes that both Parties have cited to and relied on Parts I and II of the ILC Articles on State Responsibility in their submissions. [175]

INTERNATIONAL ARBITRAL TRIBUNAL (UNDER THE ICSID CONVENTION)

Adel A Hamadi Al Tamimi v. Sultanate of Oman

In its 2015 award, the arbitral tribunal constituted to hear the *Adel A Hamadi Al Tamimi v. Sultanate of Oman* case dealt with the issue as to whether the requirements, under which an act of a private entity may be attributed to a State under the articles 4-11, can be limited by specific provisions set forth under a specialized regime. In *casu,* the attribution test provided for under the US-Oman Free Trade Agreement is narrower than that determined by the ILC Articles, since the act of a State enterprise may be attributed to a State only if some additional requirements, other than those established under

[175] International Arbitral Tribunal, *No. Aa 226: In The Matter Of An Arbitration Before A Tribunal Constituted In Accordance With Article 26 Of The Energy Charter Treaty And The 1976 Uncitral Arbitration Rules Hulley Enterprises Limited (Cyprus) - And - The Russian Federation (18 July 2014),* para. 113 (footnotes omitted).

customary international law, are fulfilled. In reaching a conclusion, the Tribunal referred to Article 8 finally adopted by the International Law Commission:

> This test under Article 10.1.2 may be narrower in some respects than the test for State responsibility under customary international law – as described, for example, in the ILC Articles on State Responsibility ("ILC Articles"), which set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the conduct of a person or entity is closely directed or controlled by the State, although the parameters of imputability on this basis remain the subject of debate.[…]
>
> The effect of Article 10.1.2 of the US–Oman FTA is to limit Oman's responsibility for the acts of a State enterprise such as OMCO to the extent that: (a) the State enterprise must act in the exercise of "regulatory, administrative or governmental authority"; and (b) that authority must have been delegated to it by the State. This is significantly narrower than the several grounds of attribution provided under the ILC Draft Articles on State Responsibility, which also include situations where, for instance, the relevant entity merely acts under the control or direction of the State: see RLA-065 at 101.[176]

[176] ICSID, *Adel A Hamadi Al Tamimi v. Sultanate of Oman,* Case No. ARB /11/33, award, merits, 3 November 2013, paras. 320, 322.(footnotes omitted).

Article 56
Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57
Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58
Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

DECISIONS OF INTERNATIONAL COURTS, TRIBUNALS AND OTHER BODIES

EUROPEAN COURT OF HUMAN RIGHTS

Jones and Others v. the United Kingdom

In its 2014 judgment in the case *Jones and Others v. the United Kingdom* the European Court of Human Rights specifically referred to the text of article 58 finally adopted by the International Law Commission.. In the instant case, the applicants – Mr Jones and individual defendants in the case – alleged that the grant of immunity in civil proceedings to the Kingdom of Saudi Arabia amounted to a disproportionate interference with their right of access to court under Article 6 of the Convention. The European Court found that no violation of Article 6 of the ECHR had taken place and that acts of organs of the Kingdom of Saudi Arabia fall under the immunity of State. The court stipulated, *inter alia,* that:

207. The Draft Articles on State Responsibility, for their part, provide for attribution of acts to a State, on the basis that they were carried out either by organs of the State as defined in Article 4 of the Draft Articles (see paragraph 107 above) or by persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles (see paragraph 108 above). The applicants do not seek to deny that the acts of torture allegedly inflicted on them engaged the responsibility of the State of Saudi Arabia. But it should be noted that the Draft Articles only concern the question whether a State is liable for the impugned acts, because once a State's liability has been established, the obligation to provide redress for the damage caused may arise under international law. There is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts. This potential dual liability is reflected in Article 58 of the Draft Articles, which provides that the rules on attribution are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of the State (see paragraph 109 above). It is clearly seen in the criminal context, where individual criminal liability for acts of torture exists alongside State responsibility (see paragraphs 44-56, 61 and 150-154 above). Thus, as the existence of individual criminal liability shows, even if the official nature of the acts is accepted for the purposes of State responsibility, this of itself is not conclusive as to whether,

under international law, a claim for State immunity is always to be recognised in respect of the same acts.[177]

[177] *European Court of Human Rights, Fourth Section, Jones and others v. the United Kingdom, (Applications Nos. 34356/06 and 40528/06), judgment, 14 January 2014, para 207.*

Article 59
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

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Annex I. Text of the Articles

Responsibility of States for Internationally Wrongful Acts
2001

Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 2001,* vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4.

Responsibility of States for Internationally Wrongful Acts

PART ONE
THE INTERNATIONALLY WRONGFUL ACT OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article l
Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2
Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(*a*) is attributable to the State under international law; and

(*b*) constitutes a breach of an international obligation of the State.

Article 3
Characterization of an act of a State as internationally wrongful

The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.

CHAPTER II
ATTRIBUTION OF CONDUCT TO A STATE

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

Article 5
Conduct of persons or entities exercising elements of governmental authority

The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Article 6
Conduct of organs placed at the disposal of a State by another State

The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed.

Article 7
Excess of authority or contravention of instructions

The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

Article 9
Conduct carried out in the absence or default of the official authorities

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

Article 10
Conduct of an insurrectional or other movement

1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law.
2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

Article 11
Conduct acknowledged and adopted by a State as its own

Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

CHAPTER III
BREACH OF AN INTERNATIONAL OBLIGATION

Article 12
Existence of a breach of an international obligation

There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.

Article 13
International obligation in force for a State

An act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.

Article 14
Extension in time of the breach of an international obligation

1. The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.

2. The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.

3. The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation.

Article 15
Breach consisting of a composite act

1. The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.

2. In such a case, the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation.

CHAPTER IV
RESPONSIBILITY OF A STATE IN CONNECTION WITH THE ACT OF ANOTHER STATE

Article 16
Aid or assistance in the commission of an internationally wrongful act

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 17
Direction and control exercised over the commission of an internationally wrongful act

A State which directs and controls another State in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and

(*b*) the act would be internationally wrongful if committed by that State.

Article 18
Coercion of another State

A State which coerces another State to commit an act is internationally responsible for that act if:

(*a*) the act would, but for the coercion, be an internationally wrongful act of the coerced State; and

(*b*) the coercing State does so with knowledge of the circumstances of the act.

Article 19
Effect of this chapter

This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State.

CHAPTER V
CIRCUMSTANCES PRECLUDING WRONGFULNESS

Article 20
Consent

Valid consent by a State to the commission of a given act by another State precludes the wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent.

Article 21
Self-defence

The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.

Article 22
Countermeasures in respect of an internationally wrongful act

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with chapter II of part three.

Article 23
Force majeure

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(*a*) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the State has assumed the risk of that situation occurring.

Article 24
Distress

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.

2. Paragraph 1 does not apply if:

(*a*) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(*b*) the act in question is likely to create a comparable or greater peril.

Article 25
Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(*a*) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(*b*) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(*a*) the international obligation in question excludes the possibility of invoking necessity; or

(*b*) the State has contributed to the situation of necessity.

Article 26
Compliance with peremptory norms

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

Article 27
Consequences of invoking a circumstance precluding wrongfulness

The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to:

(*a*) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists;

(*b*) the question of compensation for any material loss caused by the act in question.

PART TWO
CONTENT OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
GENERAL PRINCIPLES

Article 28
Legal consequences of an internationally wrongful act

The international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one involves legal consequences as set out in this part.

Article 29
Continued duty of performance

The legal consequences of an internationally wrongful act under this part do not affect the continued duty of the responsible State to perform the obligation breached.

Article 30
Cessation and non-repetition

The State responsible for the internationally wrongful act is under an obligation:

(*a*) to cease that act, if it is continuing;

(*b*) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Article 31
Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

Article 32
Irrelevance of internal law

The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part.

Article 33
Scope of international obligations set out in this part

1. The obligations of the responsible State set out in this part may be owed to another State, to several States, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach.

2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.

CHAPTER II
REPARATION FOR INJURY

Article 34
Forms of reparation

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35
Restitution

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(*a*) is not materially impossible;

(*b*) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36
Compensation

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37
Satisfaction

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

Article 38
Interest

1. Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.

2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.

Article 39
Contribution to the injury

In the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.

CHAPTER III
SERIOUS BREACHES OF OBLIGATIONS UNDER PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW

Article 40
Application of this chapter

1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.

2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

Article 41
Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.

2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.

3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

PART THREE
THE IMPLEMENTATION OF THE INTERNATIONAL RESPONSIBILITY OF A STATE

CHAPTER I
INVOCATION OF THE RESPONSIBILITY OF A STATE

Article 42
Invocation of responsibility by an injured State

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

(*a*) that State individually; or

(*b*) a group of States including that State, or the international community as a whole, and the breach of the obligation:

(i) specially affects that State; or
(ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Article 43
Notice of claim by an injured State

1. An injured State which invokes the responsibility of another State shall give notice of its claim to that State.

2. The injured State may specify in particular:

(*a*) the conduct that the responsible State should take in order to cease the wrongful act, if it is continuing;

(*b*) what form reparation should take in accordance with the provisions of part two.

Article 44
Admissibility of claims

The responsibility of a State may not be invoked if:
(*a*) the claim is not brought in accordance with any applicable rule relating to the nationality of claims;

(*b*) the claim is one to which the rule of exhaustion of local remedies applies and any available and effective local remedy has not been exhausted.

Article 45
Loss of the right to invoke responsibility

The responsibility of a State may not be invoked if:

(*a*) the injured State has validly waived the claim;

(*b*) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim.

Article 46
Plurality of injured States

Where several States are injured by the same internationally wrongful act, each injured State may separately invoke the responsibility of the State which has committed the internationally wrongful act.

Article 47
Plurality of responsible States

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

2. Paragraph 1:

(*a*) does not permit any injured State to recover, by way of compensation, more than the damage it has suffered;

(*b*) is without prejudice to any right of recourse against the other responsible States.

Article 48
Invocation of responsibility by a State other than an injured State

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(*a*) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or

(*b*) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(*a*) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and

(*b*) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.

CHAPTER II
COUNTERMEASURES

Article 49
Object and limits of countermeasures

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.

2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.

3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

Article 50
Obligations not affected by countermeasures

1. Countermeasures shall not affect:

(*a*) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(*b*) obligations for the protection of fundamental human rights;

(*c*) obligations of a humanitarian character prohibiting reprisals;

(*d*) other obligations under peremptory norms of general international law.

2. A State taking countermeasures is not relieved from fulfilling its obligations:

(*a*) under any dispute settlement procedure applicable between it and the responsible State;

(*b*) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.

Article 51
Proportionality

Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.

Article 52
Conditions relating to resort to countermeasures

1. Before taking countermeasures, an injured State shall:

(*a*) call upon the responsible State, in accordance with article 43, to fulfil its obligations under part two;

(*b*) notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.

2. Notwithstanding paragraph 1 (*b*), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

3. Countermeasures may not be taken, and if already taken must be suspended without undue delay if:

(*a*) the internationally wrongful act has ceased; and

(*b*) the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties.

4. Paragraph 3 does not apply if the responsible State fails to implement the dispute settlement procedures in good faith.

Article 53
Termination of countermeasures

Countermeasures shall be terminated as soon as the responsible State has complied with its obligations under part two in relation to the internationally wrongful act.

Article 54
Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

PART FOUR
GENERAL PROVISIONS

Article 55
Lex specialis

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

Article 56
Questions of State responsibility not regulated by these articles

The applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles.

Article 57
Responsibility of an international organization

These articles are without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article 58
Individual responsibility

These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.

Article 59
Charter of the United Nations

These articles are without prejudice to the Charter of the United Nations.

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